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MASSACHUSETTS REPORTS

202

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1909—JUNE 1909

HENRY WALTON SWIFT

REPORTER

BOSTON
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1909

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

Hon. MARCUS PERRIN KNOWLTON, Chief Justice.
Hon. JAMES MADISON MORTON.
Hon. JOHN WILKES HAMMOND.
Hon. WILLIAM CALEB LORING.
Hon. HENRY KING BRALEY.
Hon. HENRY NEWTON SHELDON.
Hon. ARTHUR PRENTICE RUGG.

ATTORNEY GENERAL

Hon. DANA MALONE.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

ALFRED E. KENRICK & another *vs.* BOSTON AND ALBANY RAILROAD COMPANY & another.

JAMES M. SEAMANS *vs.* SAME.

Norfolk. November 13, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Damages, For property taken or injured under statutory authority. *Grade Crossings. Limitations, Statute of.*

Under the provision of St. 1908, c. 478, limiting the time within which a petition for damages caused by the abolition of a grade crossing must be brought to "one year after the time the property is entered upon and work actually commenced thereon," it does not matter that the work actually begun was so trifling in amount that no charge was made for it as part of the cost of construction, if it was necessary to do it in constructing the street and it was done in good faith, and there is nothing which requires that the work shall be prosecuted continuously from the time when it actually was begun, although the fact that it was not so prosecuted may be considered in determining whether the work actually was begun at one time or another.

Under the provision of St. 1908, c. 478, limiting the time within which a petition for damages caused by the abolition of a grade crossing must be brought to "one year after the time the property is entered upon and work actually commenced thereon," an entry for the purpose of constructing any part of a way laid out under the decree of the Superior Court confirming the decision of the commissioners is deemed a taking possession of all the lands included in the laying out, and the limitation begins to run against a petitioner, whether the work was begun upon his land or upon some other part of the way thus laid out.

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MORTON, J. These are petitions for the assessment of damages caused by the taking of lands of the petitioners in the abolition of a grade crossing in Brookline. The taking was under and pursuant to a decree of the Superior Court, dated February 25, 1905, confirming the report of a commission previously appointed. The petitions were filed on March 5, 1907. The presiding judge found that there was an entry on land of the petitioner Seamans, and also on land of one O'Hare, included in the taking, on March 3, 1906, and an actual commencement of work thereon, and that this set the time running within which petitions must be brought as provided by R. L. c. 111, § 153, as amended by St. 1903, c. 478;* and he ruled that the petition of Seamans was therefore filed too late. He also ruled that the entry and the commencement of work on lands of O'Hare and Seamans operated to set the time running within which the petition of the Kenrick Brothers should have been filed, and that their petition was likewise filed too late. The judge reported the cases for our determination, and the question is whether upon the facts found by the presiding judge these rulings were right.

From the facts found it appears that the crossing abolished was called the Kerrigan Place Crossing, and that as a part of the alterations rendered necessary by the abolition of the crossing it became necessary to construct an extension of a street or place called White Place.. The town of Brookline was ordered by the decree to do the work of constructing that street. On March 3, pursuant to the direction of the board of selectmen, the town engineer and the superintendent of streets entered on lands of one O'Hare and of the petitioner Seamans that were included in the taking, and directed certain laborers in the employ of the town to dig up and remove some of the soil at places that were indicated on those lands. A small quantity of loam was dug up on the land of O'Hare, leaving a slight depression in the ground, and some small heaps of earth were removed on the land of

* The amendment consisted in changing the time within which the petition must be brought from "one year after the date of the decree of the court confirming the decision of said commission" to "one year after the time the property is entered upon and work actually commenced thereon."

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Seamans, leaving the surface even, and making in all about half a tipcart load which was carried away in a tipcart. The material thus removed had to be removed in order to construct the street. The amount of work done was small and did not appreciably affect the cost of the whole work of constructing the street, and no charge was made for it. On April 28, the employees of the town, under the direction of the superintendent of streets, filled up a hole on the Kenricks' land which had been left by the removal of a shed by the Kenricks, and, on and after May 10, the work of constructing the street was prosecuted continuously. A day or two after March 8, the town engineer reported to the board of selectmen that he and the superintendent of streets had on March 8 made a formal entry on behalf of the town, for the purpose of constructing the work required by the decree of the Superior Court, and this report was noted on the records of the board of selectmen and the clerk was ordered to notify the abutters to remove their buildings and materials from the land taken on or before April 20, 1906. Notices were sent to the petitioners that "The town has entered upon the work of constructing the alteration of Kerrigan Place as specified in the decision of the commission . . . which decision was confirmed by the Superior Court by decree dated March 22, 1905," and they were directed to remove their buildings and materials on or before April 20, 1906. These notices were dated March 12, and copies of the decision mentioned were enclosed. No inquiry was made by either of the petitioners in regard to the entry referred to in the notices, and neither of them had any actual knowledge of what was done on March 8, until after the petitions were filed.

Upon this state of facts we do not see how any other rulings could have been properly made than those that were made. There can be no question that there was an entry made on behalf of the town as required by the statute, on March 8, on lands of Seamans and O'Hare, for the purpose of constructing the street, and although what was done thereon was trifling in amount and not regarded as sufficient to warrant including it as part of the cost of constructing, nevertheless it was done, as the facts showed, in the actual commencement of the work of constructing the street on property which was taken in the laying out

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of the street. The work, though unimportant in itself, was necessary to be done in constructing the street, and there is nothing to show that it was not done in entire good faith. Nothing requires that the work shall be prosecuted continuously from the time when it is actually begun, though the fact that it was or was not so prosecuted may properly be taken into account as one of the things to be considered in determining whether the work was actually begun at one time or another. No definition can be given as to what under any and all circumstances will constitute an actual commencement of the work of constructing a street or highway on property taken therefor, any more than such a definition can be given in the case of a mechanic's lien of the work or labor which will suffice to fix the time from which the thirty days are to be reckoned within which the statement provided for must be filed if the workman desires to preserve his lien on the building on which he has labored. In the latter case it has been held that a "very trifling" amount of work, if done in good faith, may be availed of by the workman to establish the date from which the thirty days will begin to run. *Monaghan* v. *Putney*, 161 Mass. 338. *McLean* v. *Wiley*, 176 Mass. 233. Each case must depend on its own facts. We think that on the facts in the cases before us the ruling that the Seamans petition was filed too late was correct.

In regard to the petition of the Kenrick Brothers, it is contended that the work which was commenced on March 3 did not operate to set the statute running as to them because it was not done on property taken from them, but on lands of Seamans and O'Hare. R. L. c. 111, § 153, as amended by St. 1903, c. 478, provides in effect that where land is taken for the laying out of a way rendered necessary by the abolition of a grade crossing the damages shall be paid primarily by the city or town, and if the parties cannot agree, they shall be determined in the same manner as damages are assessed in the laying out of ways in such city or town. Section 152 of the same chapter provides that the decree of the Superior Court confirming the decision of the commission shall constitute a taking of the land specified in the decision of the commission as necessary to be taken, and shall be a taking by the city or town if the land is to be used for a public way. No notice is required to be given to the landowner of the

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laying out of the way and of the taking of his land therefor, as in the ordinary case of the laying out of a street or highway, because the statute requires notice and a hearing by the commission (R. L. c. 111, § 151), and the landowner will thus have notice of the taking and full opportunity to be heard in regard to the laying out of the way. Presumably he also will have had an opportunity to be heard again in the Superior Court upon the question of the confirmation of the decision of the commission. After land has thus been taken and a way has thus been laid out, and the city or town has been ordered to construct it in accordance with the decision of the commission, the public authorities are to proceed in the construction of the way, as in the case of ways laid out in the usual manner. Notices are given to parties to remove buildings, trees and other property, and the land taken is entered upon and the work of construction is begun and prosecuted as if the proceedings in the laying out of the way had been instituted and carried on by the city or town from the beginning. We discover nothing in the nature of the proceedings which leads us to infer that the Legislature could have intended that an entry for the purpose of constructing the way upon any of the lands taken should have any different effect in the cases arising under the statute before us from that which it would have in the case of a way laid out in the usual manner, nor do we see anything in the language of the statute which requires such a construction. The statute is to be construed in connection with the statutes in regard to the laying out of ways, and so construed, the provision that an entry for the purpose of constructing any part of the laying out shall be deemed a taking possession of all of the lands included in the laying out, applies to lands or property taken for the purpose of laying out a way rendered necessary by the abolition of a grade crossing as well as to lands or property taken in the laying out of other ways. In *Bates* v. *Boston Elevated Railway*, 187 Mass. 328, referred to by the petitioners, the statute provided that the petition should be brought by the petitioner "within three years after the construction of such railway upon or in front of his premises," thus expressly making the act of construction upon or in front of the petitioner's own premises the *punctum temporis* from which the time for the filing of a petition for the assessment of damages should begin to run. The

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fact that by St. 1903, c. 478, entry and the actual commencement of work were fixed as the time from which the period for filing a petition should begin to run, instead of the decree confirming the decision of the commission, has no tendency to show that the Legislature intended entry and an actual beginning of work on land of each of the petitioners as necessary to set the time running as to him. It is to be noted, though we do not rely on it as a ground of decision, that the petitioners in the present cases had express notice on March 12, 1906, from the selectmen of Brookline that the town had entered upon the work of constructing the street, but they made no inquiry and took no steps to inform themselves as to what had been done. The result is that we think that the ruling that the petition brought by the Kenrick Brothers was too late was also correct. In accordance with the report the entry will be

Petitions dismissed both as to the railroad company and the town of Brookline.

E. B. Gibbs, for the petitioners.

W. D. Turner, for the respondents.

ANNA M. ROCKWELL *vs.* PATRICK McGOVERN.

Suffolk. December 8, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Of contractor building subway under highway, *Res ipsa loquitur*. *Way*. *Evidence*, Relevance and materiality. *Practice, Civil*, Variance.

At the trial of an action against a contractor who, under a contract with the Boston transit commissioners by the terms of which he was responsible "for any injury which" might "result from his act or neglect," was constructing a tunnel for the city of Boston under various public streets, to recover for an injury received by the plaintiff in midwinter because a sidewalk upon which he was walking caved in, the caving being alleged to be due to the fact that the defendant negligently performed his work under the sidewalk, there was evidence tending to show that in the construction of the tunnel, which passed beneath the place where the sidewalk caved in, the sidewalk had been taken up by the defendant and an excavation had been made, which was refilled and the sidewalk replaced two or three weeks before the accident, and that in the summer preceding the

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accident there had been a "slump" of the soil at about the same place. *Held*, that the doctrine of *res ipsa loquitur* was applicable, and that there was evidence warranting the jury in finding that the accident was caused by the negligent manner in which the defendant had refilled the excavation and relaid the sidewalk.

At the trial of an action by one, who was injured in midwinter by the caving in of a sidewalk on a public street, against a contractor who in the course of constructing a subway had taken up the sidewalk, had made and refilled an excavation under it and had relaid the sidewalk, the plaintiff contending that the caving in of the sidewalk was due to the negligent way in which the contractor did his work, evidence that in the summer preceding the accident the bank of earth at the excavation "slid" is admissible as tending to show the character of the soil at that point.

A declaration alleged that on a day in winter the plaintiff was a traveller on a certain public street, "that the defendant was engaged in excavating beneath the surface of the street . . . and so carelessly and negligently carried on his work by his servants and agents that he permitted the sidewalk . . . to drop, so that the plaintiff . . . fell into said hole or opening caused by the said negligence of the defendant." The evidence introduced by the plaintiff showed that the work of the defendant under the sidewalk had been completed two or three weeks before the accident. *Held*, that there was no variance between the pleading and the proof.

TORT. The declaration alleged that on December 31, 1906, the plaintiff was a traveller on Hanover Street near the corner of Friend Street in Boston, "that the defendant was engaged in excavating beneath the surface of the street at said corner and so carelessly and negligently carried on its work by its servants and agents that it permitted the sidewalk at said corner to drop, so that the plaintiff, while in the exercise of due care, fell into said hole or opening caused by the said negligence of the defendant." Writ in the Municipal Court of the City of Boston dated March 1, 1907.

On appeal to the Superior Court, the case was tried before *Hardy*, J., and there was evidence tending to show that on December 31, 1906, the plaintiff was walking on Hanover Street on the left hand side of the street, proceeding toward Washington Street, and that, when she arrived at the corner of Friend Street and was about at the middle of the sidewalk of both Friend and Hanover Streets and was walking along in the ordinary way, the sidewalk "caved in," the plaintiff went down about to her knees and fell over upon the sidewalk. It appeared that about two or three weeks before the accident the defendant had taken up and relaid the sidewalk at the place where the plaintiff was injured, in the course of building a portion of a

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tunnel for the city of Boston under a contract, some of whose provisions were as follows:

"All the work contemplated and described in this contract shall be done to the satisfaction of the engineer, who shall be sole judge as to the fitness of materials, and shall have the right of correcting any errors or omissions in the plans and specifications, when such correction is necessary for the proper fulfillment of their intention; the action of such correction to date from the time that the engineer gives due notice thereof."

"The engineer shall not be deemed to be the agent of the commission or the city for any purpose whatsoever, and shall have no power, direction, or control over the work embraced in this contract, except as herein expressly set forth, or as may hereafter be voted by the commission. The engineer shall have power, without further authority from the commission: to condemn all work which in his opinion is not done in accordance with this contract and specifications, or is not done to his satisfaction; . . . but such power and authority shall be confined to the direction or specification of what is to be done under this contract, and shall not extend to the actual execution of the work, which shall be in the control of the contractor, and for which the contractor alone shall be responsible."

"Whatever method or plan is made use of in any part of the work or whoever is employed to do the underpinning, the Contractor shall not thereby be relieved of any of his responsibilities under this contract."

"The contractor shall be responsible for any injury which may result from his act or neglect. He shall exercise skill and great care in carrying on his excavation and other operations, and shall take suitable measures to prevent injury to buildings, the subway and other structures in or near the route of the tunnel."

"The contractor shall repave the street on a gravel base, and shall keep the surface over and along the trench and other excavations in a safe, neat, and satisfactory condition, and at its proper grade, for a period of one year after the work contemplated in this contract is finished, and shall be responsible for any accident that occurs on account of the defective condition of such surface. (See Article T.)"

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"The contractor shall assume and have sole charge and possession of all the work included in this contract until the termination thereof, and shall be solely liable for all damage occasioned in any way by his act or neglect, or that of his agents, employees, or workmen, or of any person or persons in and about the work embraced in this contract."

"Article Q. The contractor shall indemnify and save harmless the city and commission, its and their officers and agents, from all suits or claims, of every name or description, brought against the city or commission, or its or their officers and agents, for or on account of any injury or damages to person or property received or sustained by any person or persons, by or from the contractor, his servants or agents, in or on account of work done under this contract or extensions of or additions thereto, whether caused by negligence or not, or by or in consequence of any negligence in guarding the same, or any materials or explosives for the same, or by or on account of any improper materials used in its construction, or by or on account of any accident, or of any act or omission of the contractor or his agents; and the contractor further agrees that so much of the money due to him under this agreement as shall be considered necessary by the commission may be retained until all such suits or claims for damages as aforesaid have been settled, and evidence to that effect furnished to the satisfaction of the commission."

"Article T. If, at any time before twelve months have elapsed from the date of the completion of the work contemplated in this contract and any amendment thereof or order for extra work as herein provided, any part shall, in the opinion of the engineer, require repairing, the engineer may notify the contractor, in person or by mail, to make the required repairs. If the contractor neglects to make such repairs promptly, to the satisfaction of the engineer, then the engineer may employ other persons to make the same and the expense thereof shall be paid by the contractor. The commission may cause the expenses of the repairs to be paid out of any money due the contractor on account of this contract."

At the close of the plaintiff's evidence the defendant requested the presiding judge to rule that (1) "Under all the evidence and pleadings in the case the plaintiff cannot recover in this

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action"; and (2) that "there was no evidence of negligence of the defendant contributing to the plaintiff's injury." The presiding judge refused to make the rulings requested. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

M. O. Garner, for the defendant.

G. P. Beckford, for the plaintiff.

MORTON, J. There was evidence warranting a finding that the plaintiff was in the exercise of due care. She was a traveller upon the highway with nothing in the apparent conditions of the sidewalk to call for anything more than ordinary care on her part, and it could be found and must have been found that she was exercising the degree of care required of her.

There was also evidence which warranted a finding that the accident was caused by the negligent manner in which the defendant had refilled the excavation and in which he had relaid the brick. There was evidence warranting the jury in finding that if the excavation had been properly filled and the brick properly laid the accident would not have happened. The case was especially one for the application of the doctrine of *res ipsa loquitur*. For a statement of the doctrine, see *Thomas* v. *Boston Elevated Railway*, 193 Mass. 438, 440.

Evidence of the "slide" or "cave in" which occurred in the summer was admissible as tending to show the nature of the soil and as bearing in that way upon the degree of care required in refilling the excavation.

We do not construe the declaration as alleging that the defendant was engaged in the work of excavation at the time of the accident, but as meaning that at some time he had been so engaged and had so negligently carried on the work as to permit the sidewalk to drop and that the plaintiff fell into the hole thereby caused. So construed, there was no variance between the pleadings and the proof.

Exceptions overruled.

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JOHN McMANUS *vs.* SAMUEL B. THING & others.

Suffolk. December 9, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, In use of elevator, Licensee, Proximate cause. *Elevator*. *Usage*, Right existing by customary practice. *Practice, Civil*, Conduct of trial, Setting aside special finding, Verdict.

In a business building, in which there is a freight elevator for the common use of all the tenants and their employees, a practice or custom existing in the building, which gives the servant of any tenant who is using the elevator in his master's business the right to use it exclusively until his use of it is completed, is not unlawful or improper, and may be taken into account in passing upon a question of negligence in the use of the elevator by a servant of one of the tenants.

In a business building, in which there is a freight elevator for the common use of all the tenants and their employees, a practice or custom existing in the building, which gives the servant of any tenant who is using the elevator in his master's business the right to use it exclusively until his use of it is completed, if a servant of one of the tenants is thus using the elevator and before the completion of such use complies with the request of the servant of another tenant to allow him to come upon the elevator with a heavy crate for transportation to one of the upper floors, the last comer is a mere licensee, and the master of the man who permitted him to enter the elevator before completing his own use of it owes him no duty except not to injure him by a wilful or wanton and reckless act, even if the servant of such master was acting within the scope of his employment when he turned aside from his own work to accommodate and assist the servant of the other tenant.

In an action for personal injuries alleged to have been caused by the negligence of a servant of the defendant, if there is no contention and nothing to show that the plaintiff and the defendant's servant were fellow servants, it is proper for the judge to refuse a request of the plaintiff for a ruling, that, not being fellow servants, the plaintiff did not assume the risk of being injured by the negligence of the defendant's servant, there being no occasion for making such a ruling.

In an action for personal injuries alleged to have been caused by the negligent starting of a freight elevator in a business building by a servant of the defendant, a tenant in the building, it appeared that the elevator was maintained for the common use of all the tenants and their employees and that there was a practice or custom existing in the building, which gave the servant of any tenant who was using the elevator in his master's business the right to use it exclusively until his use of it was completed. The plaintiff was a servant of another of the tenants who came upon the elevator with a heavy crate, and the evidence was conflicting as to whether the servant of the defendant, who had been using the elevator to take down some cases of rubbers for shipment, was continuing its use in taking back three cases of rubbers because they were badly broken, and was in possession of the elevator when the plaintiff asked permission to bring the crate upon it, or whether, as the plaintiff testified, he found the ele-

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vator empty and had loaded the crate upon it when the defendant's servant came upon the elevator and started it, and the plaintiff's foot was caught. The plaintiff asked the presiding judge to rule that if the defendant's servant "kept the elevator at the street level for more than a reasonable time after unloading his goods, the plaintiff had a right to take the elevator to carry his goods to an upper floor." The judge refused to make this ruling on the ground that there was no evidence to show that the defendant's servant kept the elevator an unreasonable time after unloading. There was, in fact, evidence for the defendant which, if believed, would have warranted a finding that the defendant's servant had possession of the elevator and had detained it for an unreasonable time. *Held*, that, although, if the reason given for the refusal of the ruling were the only ground on which it could be upheld, such refusal could not be sustained, yet the ruling was refused rightly on other grounds, namely, that the keeping of the elevator at the street floor by the defendant's servant was not and could not be found to be the proximate cause of the accident, which was the alleged negligent starting of the elevator by the defendant's servant, the fact that the defendant's servant had kept the elevator at the street level for an unreasonable length of time after unloading it, if he did so, being one of the conditions under which the accident occurred but not a cause of it, and that such detention of the elevator did not give the plaintiff a right to take possession of it before the use of it by the defendant's servant was completed.

In an action, in which there has been a verdict for the defendant and the plaintiff has made a motion asking the judge to set aside the general verdict and also to set aside the answers of the jury to certain questions submitted to them by the judge, the judge may set aside one of the special findings of the jury, which there was no evidence to warrant, and at the same time permit the general verdict to stand, where there is no inconsistency in doing so.

Where there is a general verdict and there are also special findings, which are not inconsistent with one another or with the verdict, the question whether the verdict should be set aside is a matter within the discretion of the presiding judge.

Morton, J. This case was previously before this court, as reported in 194 Mass. 362, on the defendants' exceptions, which were sustained. There was a second trial and the defendants had a verdict. The case is now here on the plaintiff's exceptions to the refusal of the presiding judge* to instruct as requested, to certain instructions that were given, to the setting aside on the defendants' motion of one of the answers made by the jury to questions put to them by the judge, and to the refusal of the judge to set aside the verdict and certain other answers on the plaintiff's motion. The judge certified that he overruled the plaintiff's motions in the exercise of his judicial discretion.

The parties were widely at issue as to the circumstances attending the accident, including the respective rights of the

* *Sherman*, J.

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plaintiff and Redding to the use of the elevator at the time of the accident. The plaintiff testified in substance that the elevator was empty and that there was no one in it, and that he had loaded on to it a heavy crate which he was going to take to one of the upper floors, when Redding came on to the elevator, and, without saying anything to the plaintiff, started it, and the elevator caught the plaintiff's foot, causing the injury complained of. The plaintiff testified on cross-examination that if any one (meaning one of the tenants or their employees) was in possession of the elevator and was using it, he had a right to keep it and to use it until he was through with it and no one had a right to interfere with him. Redding's testimony was, in substance, that he had loaded on to the elevator and taken down to the street level a number of cases of rubbers, which he had unloaded with the exception of three cases that were so badly broken that he was going to take them back again, and had started the elevator up when the plaintiff jumped on as it was moving, and cried out, "Wait, stop," which he did; that the plaintiff then requested him to return to the street which, after remonstrance, he also did; and that the plaintiff loaded the crate on to the elevator and he, Redding, asked him if it was "all right," and the plaintiff answered "Yes"; and that then he, Redding, pulled the rope to go up and the elevator started and the accident immediately happened. Redding further testified, in substance, that the practice in regard to the use of the elevator was the same as that to which the plaintiff had testified. One Sawyer, called by the defendants, testified to the same effect. We have stated the substance of all the testimony that there was in regard to that matter. The defendants contended that Redding had the exclusive right to the use of the elevator at the time of the accident, and that the plaintiff was a licensee or trespasser, and was not there as of right. The plaintiff contended that he was rightfully on the elevator, even if the defendants' goods were upon the elevator and the defendants' servant was using it.

It was undisputed that the elevator was for the common use of all of the tenants of the building and their employees, and but for the practice or custom which existed the plaintiff's contention would be sound. But the effect of the practice which

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existed was to give to the servant of any tenant, who was using the elevator in his master's business, the exclusive right to use it until the business was finished, and to render the use or attempted use of it meanwhile by another permissive or wrongful. Understanding, as we do, that the practice was limited to the use of the elevator in the business of the tenants, it cannot be said, we think, that it was not a lawful and proper custom, and that it could not rightfully be taken into account by the jury in passing upon the question of the defendants' alleged negligence.

It also follows that the instruction objected to that if the jury found that Redding was using the elevator and had not finished using it, and the accident happened as he testified, then the plaintiff was a licensee and the defendants owed him no duty, and the plaintiff could not recover, was, under the circumstances, correct. It was not and is not contended that there was any evidence warranting a finding that Redding acted wilfully or wantonly and recklessly.

It follows also that the instructions in regard to the question whether at the time of the accident Redding was acting within the scope of his employment were correct. The plaintiff indeed concedes in effect that they were, if the plaintiff was in possession of the elevator and Redding had as against him no right to use it until the plaintiff had finished using it. It was rightly left to the jury to determine whether Redding was or was not acting within the scope of his employment at the time of the accident if, as the plaintiff testified, Redding came into the elevator when he, the plaintiff, was in possession of it and started it up without saying anything to him, or if, being in possession of it and having a right to use it in his master's business, instead of doing so he turned aside, as it were, to accommodate and assist the plaintiff, and the accident happened while he was so engaged. *Bowler* v. *O'Connell*, 162 Mass. 319. *Driscoll* v. *Scanlon*, 165 Mass. 348. *Brown* v. *Jarvis Engineering Co.* 166 Mass. 75.

In view of what we have said it is plain that the third instruction requested, that "the defendants had no exclusive right to use the elevator," was rightly refused, if, by it, was meant that under no circumstances would the defendants have the right to the exclusive use of the elevator. That was one of the matters

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in issue. If by it was meant that the defendants had not the sole right to use the elevator, then no such right was claimed by any one and the ruling was rightly refused for that reason.

For similar reasons the fourth instruction requested by the plaintiff that "The defendants had no right to interfere with the use of the elevator by the plaintiff" could not be given. To have given it would have been, in effect, to instruct the jury that at the time of the accident the plaintiff was using the elevator as of right, which was denied by the defendants.

There was no contention and nothing to show that the plaintiff and Redding were fellow servants, and therefore the instruction requested that not being fellow servants "the plaintiff did not assume the risk of being injured by Redding's negligence," was uncalled for and rightly refused.

The fifth request was that "If Redding kept the elevator at the street level for more than a reasonable time after unloading his goods, the plaintiff had a right to take the elevator and run it to carry his goods to an upper floor." This was refused on the ground that there was no evidence to show that Redding kept it an unreasonable time after unloading. But the plaintiff testified that there was no one on the elevator when he entered it, and that no person had been using it for fifteen or twenty minutes. One Bagley, a witness for the defendant, testified on direct examination that he was helping Redding to take goods from the elevator and was loading them on to a team in the street. On cross-examination he testified that he lost sight of Redding and did not see him in the elevator for at least five or ten minutes before the accident. And Redding testified, amongst other things, that he had unloaded all of the goods that he took down except three cases which were badly broken and which he was going to take back and had placed on one side of the elevator for that purpose. This evidence, if believed, would have warranted a finding that Redding had possession of the elevator and had detained it for an unreasonable time, and, if the reason given for refusing the ruling were the only ground on which it could be upheld, the exceptions would have to be sustained. There is, however, another ground on which we think the instruction requested was rightly refused. The keeping of the elevator at the street floor by Redding an unrea-

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sonable time after he had unloaded it was not and could not be found to be the proximate cause of the accident. The cause of the accident was the alleged negligent starting of the elevator by Redding. The fact that he had kept the elevator at the street level an unreasonable length of time after unloading it was one of the conditions under which the accident occurred, not the cause or one of the causes of it, and the fact, if it was a fact, that Redding kept the elevator an unreasonable time gave the plaintiff no right to enter and dispossess him. On these grounds the refusal to give the instruction requested was right.

No exception was saved by the plaintiff, as we understand the case, to the refusal to give the sixth instruction that was requested.

If any exception lies to the action of the judge upon the plaintiff's motion to set aside the verdict and upon his motions to set aside the answers of the jury to certain of the questions that were put to them, we see no error of law in what was done. There was no evidence to warrant a finding that both the plaintiff and Redding had a right, according to the custom, to use the elevator at the same time, and the judge had a right to set aside the jury's answer to the question involving that issue and at the same time to permit the general verdict in favor of the defendant to stand. *Monies* v. *Lynn*, 119 Mass. 273.

Whether the verdict should be set aside, and also the other answers to which the plaintiff's motions related, was a matter within the discretion of the presiding judge. *Perry* v. *Shedd*, 159 Mass. 200. There was no inconsistency in the answers that were allowed to stand or between them and the verdict.

Exceptions overruled.

C. Reno, for the plaintiff.

E. E. Blodgett, (*F. W. Eaton* with him,) for the defendants.

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DENNIS P. CRIMMINS *vs.* EDWARD S. BOOTH.
SAME *vs.* FREDERICK LEYLAND AND COMPANY (1900) LIMITED.

Suffolk. December 9, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Of owner of ship toward one employed by stevedore under contract with owner, Independent contractor, Employer's liability. *Ship*. *Contract*, Construction. *Words*, "Appliance."

Apart from contract, the duty at common law of the owner of a ship at a wharf toward an employee of a stevedore lawfully at work upon the ship is the same as that of an employer respecting the apparatus and the permanent constructions of the ship, with and upon which the employee is expected to work, even though he may be in the immediate employ of the stevedore as an independent contractor.

Where a stevedore makes a contract with the owner of a ship to load and unload it, the owner is liable to an employee of the stevedore who, while he was standing upon a hatch in the course of his duties, was injured by the hatch falling in because it was provided with insufficient flanges and coamings to hold it in place, if the employee did not know of such insufficiency and it was not obvious and could be ascertained only by an experiment, to perform which two men at least would be required, or by accurately measuring a five foot space.

A stevedore made with the owner of a ship a contract in writing for the loading and unloading of the ship by which it was provided that the stevedore should hire and pay the men necessary for the purpose and should "provide all necessary engines, fuel, lights, tackle and other appliances for the purpose" and should "have the sole and entire charge, control and direction of the work," that in performing the work in question "the stevedore has permission to use the ship's winches, booms, falls and tackle or any other appliances of the ship if he desires so to do, in such condition as he may find them in, on or over the ship's deck, the stevedore furnishing men to run them; but no obligation of any sort is assumed by the [owner] . . . or is to be implied from such permission . . . or otherwise to keep or have such winches, booms, falls and tackle or other appliances . . . in safe or fit condition for use . . . and this permission shall be construed as a mere license to the stevedore and his men to use at his or their own risk . . . any winch, boom, fall, tackle or other appliance that may happen to be on or over the ship's deck." An employee of the stevedore who had no knowledge of such contract was injured by the falling in of a hatch due to the insufficiency of the coamings and flanges upon which it rested. *Held*, that the contract did not by its terms or fair intendment include the hatches of the vessel in the "appliances" therein mentioned. *Whether*, if the contract had included the hatches among such appliances, it would have affected the rights of the employee who did not know of it, therefore was not determined.

The relation of the owner of a ship toward a stevedore and his employees engaged in loading or unloading it implies by inherent necessity an invitation on the part of the owner to such employees to use the hatches of the ship for such purposes,

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and from such relation arises a duty on the part of the owner to call to the attention of the stevedore and his employees dangers in such use that are not obvious nor incident to the business, or to pay for the consequences of a failure so to do.

Where a stevedore makes a contract with the owner of a ship to load and unload the ship, and the contract provides that the stevedore is to have "the sole and entire charge, direction and control of the work," the stevedore becomes liable to his employees engaged in the work for injuries resulting from an insufficiency of the flanges and coamings of a hatch which was not obvious nor apparent upon reasonable inspection, and of which he might give warning to his employees. Distinguishing *Hyde* v. *Booth*, 188 Mass. 290.

Where a stevedore, who by the terms of a contract in writing with the owner of a ship has "the sole and entire charge, direction and control of the work" of loading and unloading the ship and is required to furnish all necessary lights, directs an employee, just before midnight on a dark night with no artificial light to assist in covering the hatches of the ship and, while doing as directed, the employee is injured by the falling in of a hatch upon which he was standing, due to an insufficiency of its flanges and coamings of which he did not know and which without a light he could not have discovered on inspection but which he might have discovered if sufficient light had been furnished, the stevedore is liable to his employee for his injuries thus received.

TWO ACTIONS OF TORT for personal injuries received by the plaintiff, a longshoreman in the employ of the defendant in the first case, while at work in the course of his employment putting the covers on the hatches of the Columbian, a vessel owned by the defendant in the second case. Writs in the Superior Court for the county of Suffolk dated respectively July 16, 1904, and April 10, 1906.

The cases were tried before *Richardson*, J. The facts are stated in the opinion. At the close of the plaintiff's evidence, the presiding judge ruled that on all the evidence the plaintiff was not entitled to recover against either defendant and therefore ordered a verdict for the defendant in each case. The plaintiff alleged exceptions.

H. F. R. Dolan, (*T. R. Bateman* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant Booth.

A. D. Hill, (*F. J. Sulloway* with him,) for the defendant company.

RUGG, J. These are two actions of tort to recover damages for the alleged negligence of the defendants. The declaration in the one against the Leyland Company contains a single count averring liability at common law for providing an unsafe place in which the plaintiff was rightfully at work. It contains no count based upon R. L. c. 106, § 76. The declaration in the

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action against Booth contains one count alleging negligence at common law and two others based respectively upon the first and the second clauses of R. L. c. 106, § 71.

The plaintiff was a longshoreman in the employ of Booth, a stevedore, and was working upon the Columbian, a vessel owned by the Leyland Company. On the day of the accident he had been helping to load the vessel. Just before midnight he, with others, was directed to stop work and put on the hatches. The hatches, made of wooden planks, were about five feet long, two feet wide, three inches thick, and were each so heavy that two men were required to handle them. The hatchway itself was about fourteen feet long by ten feet wide, surrounded by an iron frame called the coamings. When the hatch was to be put on, there was first placed across the middle of the hatchway an iron beam called the thwartship piece, and on its middle two other iron beams rested, called fore and aft pieces, one reaching to the middle of the forward coamings and the other to the middle of the aft coamings. These three beams fitted in sockets, and on both sides of the fore and aft pieces were flanges two to two and one half inches in width, and on the inside of both the inshore and offshore coamings were flanges one to one and one half inches in width. It was the customary, and the only practicable way, after the first hatch was put on, for one man to stand on it and successive hatches in placing the next. The night of the accident was dark and a canvas suspended from a boom over the hatchway came down within two or three feet of the deck and covered the whole hatchway except for an opening where the cargo was taken in. There was no light on the deck. The plaintiff with others was putting down the hatches, his post of duty requiring him to stand on the hatches as they were successively placed. As he was standing on the fourth or fifth hatch and helping to put the next one in position, the one on which he was standing went down and he sustained thereby the injuries for which in these actions he seeks recovery. There was sufficient evidence to support a finding that the hatches were being put down in the same order and places in which they were when the ship came into port, and there was no evidence which compelled the conclusion that they were being placed in any way other than that

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for which they were supplied by the defendant shipowner. The next morning after the accident the officers of the vessel and the defendant Booth and others tested the hatch that went down with the plaintiff on it. It then appeared that when pressed hard against the coamings (where the flange was one to one and one half inches wide) it would hold, but when pressed against the fore and aft piece (where the flange was two to two and one half inches wide) the hatch cleared the flange on the coamings by about one half inch and would go down. It does not appear that the plaintiff had had anything to do with these hatches before the accident except that he helped to put hatches upon the same hatchway at six o'clock on the night of his accident.

The defendant Booth was doing the work of loading and unloading the Columbian under a contract with her owner, from which this extract was in evidence:

"The said stevedore agrees to discharge and load each of the said steamships at the stated rates promptly upon her arrival in Boston. Said stevedore agrees to hire and pay the necessary men for the purpose, to provide all necessary engines, fuel, lights, tackle and other appliances for the purpose, and shall have the sole and entire charge, direction and control of the work; (the work, however, is to be done to the satisfaction of Fred'k Leyland & Co. (1900) Ltd. and of the Owners of the steamers stated on the attached schedule) and the Steamship Company agrees to pay for discharging and loading the same at the rates specified, payment for the work on each ship to be made when each ship is loaded ready for sea. A sufficient number of men is to be provided by Mr. Booth whenever required and at his sole expense for docking and undocking the various steamers coming under this contract.

"There is to be no extra charge for rigging up to start the ship or for taking off hatches and putting them on again whenever required, neither is there to be any charge for handling cargo tents and stages used in discharging and loading.

"In loading and discharging the steamships in question, the stevedore has permission to use the ship's winches, booms, falls and tackle or any other appliances of the ship if he desires so to do, in such condition as he may find them in, on or over

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the ship's deck, the stevedore furnishing men to run them; but no obligation or undertaking of any sort is assumed by the Steamship Company or its agents, or is to be implied from such permission to use or from the furnishing by the ship of the necessary steam or otherwise to keep or have such winches, booms, falls and tackle or other appliances or any of them at any time in safe or fit condition for use, or to have any winches, booms, falls and tackle or other appliances in any condition on or over the ship's deck, and this permission shall be construed as a mere license to the stevedore and his men to use at his or their own risk and discretion for the purposes aforesaid, any winch, boom, fall, tackle or other appliance that may happen to be on or over the ship's deck without any responsibility whatever on the part of the Steamship Company or its agents in respect to the fitness or safety of such winch, boom, fall, tackle or other appliance for such use or its condition in any respect at any time."

The plaintiff was not a party to this contract and did not know of its existence. Due notice under the employers' liability act was given to the defendant Booth. The presiding judge directed a verdict in favor of both defendants.

In the absence of any special contract governing the relation between a shipowner and stevedore, it seems to be settled that the hatchway and hatches are not a part of the ways, works and machinery of the stevedore. *Hyde* v. *Booth*, 188 Mass. 290. *Bamford* v. *G. H. Hammond Co.* 191 Mass. 479. Hatches are as much a part of the ship as doors are of a house. It is impossible to load or unload her without using them. The defendant Booth could not perform his contract with the other defendant without using them, and taking them off and putting them on is specifically referred to in the contract. But this is not decisive in favor of either of the defendants.

It appears that the work of putting on these hatches was being done in the dark late at night. There is nothing to show that this was not the usual way for performing this work, or that the plaintiff assumed the risk of any beyond the ordinary dangers of working without light. Apart from contract, the duty of the defendant shipowner toward a longshoreman lawfully at work upon his vessel is the same as that of an employer respecting his apparatus and the permanent constructions with and upon which

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the laborer is expected to work, even though that laborer may be in the immediate employ of an independent contractor. *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. *Toomey* v. *Donovan*, 158 Mass. 232. *Elliott* v. *Hall*, 15 Q. B. D. 315. *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 168 Mass. 450. Such duty is commensurate only with the scope of the invitation extended to the longshoreman which is simply to use the ship and its appurtenances as they then are and does not require improvements or changes, which would make conditions of labor safer. As was said in *Sullivan* v. *New Bedford Gas & Edison Light Co.* 190 Mass. 288, at page 292, "the employee as matter of contract assumes all obvious risks incident to the use of the apparatus on which he was employed to work." *McLeod* v. *New York, New Haven, & Hartford Railroad*, 191 Mass. 389, 391. But the contract does not contemplate an assumption of a risk which is not obvious. The numerous set screw cases all go upon the ground that the risk of injury from such a source is an obvious one and may be easily enough discovered on inspection. *Mutter* v. *Lawrence Manuf. Co.* 195 Mass. 517, and cases cited. *McKenna* v. *Gould Wire Cord Co.* 197 Mass. 406. But even when the assumption of risk grows out of a contract, it has never been held to cover those unseen or obscure dangers, which cannot reasonably be discerned by an employee, and which the employer properly may be held to know about. Under such conditions a duty to warn exists on the part of owner or employer, who knows or ought to know the danger, toward the laborer, who does not know and cannot fairly be charged with knowledge of it. *Wheeler* v. *Wason Manuf. Co.* 185 Mass. 290. *Silva* v. *Davis*, 191 Mass. 47.

The circumstances in the case at bar bring it within the latter rule. The duty of the defendant shipowner is in this respect as strong as it would be if it was the employer of labor. The danger was fraught with highly perilous consequences. The shortness of a little over half an inch, which rendered the hatch unsafe when placed in one position though harmless when put in another, was one which cannot be said as matter of law to have been apparent upon inspection by the eye as hatches of that size and character were lying on the deck. They were so heavy that they could not be moved by one man. It cannot be ruled

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as a matter of law that a danger is obvious when it is not readily observed by the eye and is revealed only either by an experiment, to perform which two men at least are required, or by accurately measuring a five foot space. The doctrine of contractual assumption of risk rests for one of its fundamental supports upon the theory that the employee can, if he desires, look over the place at which and appliances with which he is to work, if he makes the contract for service, and decide whether he cares to enter the employment upon the conditions disclosed in view of the well settled principle of law that the employer is not bound to change the permanent arrangements then existing in order to make them safer. The risks with reference to which he may be held to have made his contract therefore are only those open and obvious to a reasonably prudent man making such examination as he might be expected to make if he wished to ascertain the nature and perils of the prospective service. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153. *Young* v. *Snell*, 200 Mass. 242. *Donahue* v. *Boston & Maine Railroad*, 178 Mass. 251. *Doolan* v. *Pocasset Manuf. Co.* 200 Mass. 200, 202. *Fearns* v. *New York Central & Hudson River Railroad*, 186 Mass. 529. *Carroll* v. *Metropolitan Coal Co.* 189 Mass. 159. *Murphy* v. *Marston Coal Co.* 188 Mass. 385. The circumstances here are such as not to warrant the ruling as a matter of law that the danger was obvious or that the plaintiff contracted with reference to it. While the general principles laid down in *Sullivan* v. *New Bedford Gas & Edison Light Co.* 190 Mass. 288, are applicable to the case at bar, the facts here differ enough to distinguish the two cases and call for a different result here from that reached in the Sullivan case.

The written agreement between the shipowner and the stevedore, by which the parties attempted to make the latter and his employees mere licensees, does not by its terms or fair intendment include hatches. Therefore it is not necessary to discuss whether such a contract would affect the rights of those not parties to it and ignorant of its terms. See R. L. c. 106, § 76; *Kansas Pacific Railway* v. *Peavey*, 29 Kans. 169. While it is possible that under some circumstances and in another connection the word "appliance" might be broad enough to comprehend them, reading it as used in this contract in the

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light of the maxim, *noscitur a sociis*, it is apparent that it was intended to mean only those portions of a ship's outfit and equipment kindred in general character to winches, booms and other like apparatus, and not to include such permanent and essential parts of the ship itself as hatches.

The case against the Leyland company is also plainly distinguishable from *Pingree* v. *Leyland*, 185 Mass. 398. There the injury arose from a defective winch belonging to the shipowner but used by the stevedore whose employee was the plaintiff. There was no evidence as to the terms under which it was thus used. It was said that it might be a mere loan of the winch in its then defective condition with no express or implied agreement that it was in good repair. That case was governed by the principle applied in *Mahoney* v. *W. A. Murtfeldt Co.* 198 Mass. 471, which these defendants embodied in their contract. But here the hatches were not a piece of machinery; they were an essential part of the vessel. The relation of longshoreman and shipowner implied by inherent necessity an invitation on the part of the latter to the former to use the ship for purposes of loading and unloading, and to use the hatches therefore as much as the hold. It must have been the intention of the shipowner that the hatches should be used by the plaintiff and his fellow laborers. Out of this springs liability. *Hayes* v. *Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. The duty is not onerous; it is only to call attention to dangers not obvious nor incident to the business or to pay for the consequences of failure to do so.

It is strongly urged that the defendant Booth is exonerated from liability in a case like the present by *Hyde* v. *Booth*, 188 Mass. 290. But without impugning that decision in any degree, the present case is distinguishable from it. As has been pointed out, the contract entered into between the two defendants does not include the hatches. But the contract between the two defendants distinguishes this from the Hyde case in that the stevedore here has "the sole and entire charge, direction and control of the work" of discharging and loading the steamship. This involves such possession as is necessary to perform the contractual obligation. It constitutes an appropriation by him for the time being of the ship for the purposes of performing

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the contract. Having thus appropriated it by virtue of his contract he became liable to his employees respecting it as if it were his own. While to the ordinary relation of stevedore and shipowner the rule of *Hyde* v. *Booth* would apply, the present contract places the stevedore in a position akin to that of the lessee of a tenement, who adopts the building as his own and assumes the obligation of owner toward his employees. While he could not be required to make over the ship in order to render it safer, he was obliged to give warning of those dangers not incident to the business and not apparent upon reasonable inspection. In this respect his duty was the same as that indicated as resting upon the owner of the vessel.

Moreover, it might have been found that a proximate contributing cause to the plaintiff's injury was the darkness in which he was directed to assist in putting on the hatches by the foreman of the defendant Booth. The duty to furnish lights was one cast by the contract between the two defendants upon the defendant Booth. Many cases, where failure to furnish proper lights has been held not to be evidence of negligence, are not in point, for the reason that the danger, which confronted the plaintiff, was one as to which he may have been found to have had no knowledge and which adequate light might have revealed. The defendant Booth therefore had sufficient control of the ship to enable him to provide necessary lights, and it might have been found to be his duty with reference to such a condition as existed here to furnish them. Even though as to ordinary conditions it may have been the usual way to put on the hatches in the dark, yet to set his men at work in the dark with a short hatch amounted substantially to a trap. Though he could not change the construction of the ship, he could have done something to enable the men to see hidden and unusual dangers. *Gaynor* v. *Old Colony & Newport Railroad*, 100 Mass. 208. *Haggblom* v. *Winslow Bros. & Smith Co.* 198 Mass. 114. *Hodde* v. *Attleboro Manuf. Co.* 198 Mass. 237. *Johnson* v. *Field-Thurber Co.* 171 Mass. 481.

Exceptions sustained in both cases.

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LUCY E. SWIFT *vs.* MABEL M. BOYD.
SAME *vs.* SAME.
SAME *vs.* SAME.
SAME *vs.* SAME.
MABEL M. BOYD *vs.* LUCY E. SWIFT.

Plymouth. December 10, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Landlord and Tenant, Tenancy by sufferance. *Practice, Civil*, Judge's charge.

The owner of a certain building did not own the land upon which it stood, but as a tenant at will paid to the owner of the land a ground rent for such land, and let the building as a store to one who paid him an agreed price therefor. The owner of the land by a lease in writing let a larger parcel of land, which included that upon which the building stood, to the occupant of the building, the lease containing no reservation or condition relating to the building. The owner of the building at once knew of such lease, but did not remove the building from the land, and refused to pay to the lessee any rent for the land it occupied. *Held*, that, upon the making of the lease, the owner of the building became as to the land upon which the building stood a tenant at sufferance of the lessee named in the lease and in the absence of any special agreement between the parties was liable under R. L. c. 129, § 8, to such lessee for rent of the land occupied by the building.

At the trial of an action of contract upon an account annexed for the use and occupation of certain land, it appeared that the land was occupied by a building owned by the defendant, who at one time had paid a ground rent to the owner of the land, and that the building was occupied by the plaintiff by permission of the defendant; that, at the beginning of the period stated in the account annexed, the owner of the land had leased it by a lease in writing to the plaintiff. The answer contained an allegation of payment and there was evidence tending to show an agreement between the parties whereby the rent due to the plaintiff from the defendant was applied toward payment of the amount due to the defendant from the plaintiff, and that both parties treated the building as a chattel. The presiding judge charged the jury that the "defendant must show that the plaintiff agreed not to charge her any land rent after the plaintiff had taken the lease, and that the defendant would be liable to pay said land rent unless he was excused from so doing by the plaintiff." *Held*, that the defendant was not harmed by the charge.

The fact, that, upon the owner of land making a lease of it to another, and a former tenant at will thus becoming a tenant at sufferance of the lessee, such tenant at sufferance asserts that he will pay no rent to the lessee, does not affect his liability to do so under R. L. c. 129, § 8.

FOUR ACTIONS OF CONTRACT, the declaration in each of which was upon an account annexed containing one item "for

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use and occupation" of land "hired of the plaintiff by the defendant at eight dollars a month." In the third action the defendant filed a declaration in set-off "for use and occupation of a certain building or store in said building . . . hired of the defendant by the plaintiff at $20 per month." Writs in the Superior Court for the county of Plymouth dated respectively December 19, 1903, January 13, 1905, September 9, 1905, July 20, 1906. Also

CONTRACT by the defendant in the above actions against the plaintiff therein with a declaration upon an account annexed with a single item for use and occupation of the store mentioned in the declaration in set-off in the third of the preceding actions for a different period than that therein mentioned. Writ in the Superior Court for the county of Plymouth dated July 23, 1906.

The cases were tried together before *Holmes*, J. The facts are stated in the opinion. At the close of the evidence Mrs. Boyd asked the presiding judge to rule as follows:

"1. That if the jury find that the plaintiff was informed by Mrs. Boyd that she will pay no land rent after the plaintiff took her lease of said land, and that the rent of the building thereon would be $18 per month net and afterwards $20 per month net, then the plaintiff cannot maintain her actions.

"2. That if the jury find that the plaintiff understood from the presentment of the rent bill on August 1, 1902, and on September 1, 1902, that Mrs. Boyd would not pay any land rent after the plaintiff had taken a lease, then the plaintiff cannot maintain any action against the defendant for rent or for use and occupation of said land.

"3. That if the jury find if the plaintiff occupied said store and land with the right to give up said store at any time and knowing the claim made by the defendant, that she would not pay the land rent, then the plaintiff Swift cannot maintain these actions."

The presiding judge refused to rule as requested, and in his charge to the jury made among others the statement quoted in the opinion. The jury found for the plaintiff in the first four, and for the defendant in the fifth case; and Mrs. Boyd alleged exceptions, which, after the death of *Holmes*, J., were allowed by *Richardson*, J.

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B. E. Holland & C. B. Loud, for Mabel M. Boyd.

E. B. Powers, for Lucy E. Swift.

RUGG, J. The exceptions in the action of *Boyd* v. *Swift* have not been argued, and so far as not expressly waived are treated as waived. Therefore what we have to say relates wholly to the four actions, which are brought by Swift to recover rent due her from Boyd as her tenant at sufferance.

Certain persons, called the Sawyer heirs, owned a tract of land. On this land was a building belonging to the defendant. Before July 1, 1902, the defendant, occupying the land with her building as tenant at will of the owners, paid them an agreed monthly ground rent. The plaintiff took a lease of this land from the owners for a term of years beginning with July 1, 1902, so far as appears with no reservations and subject to no conditions as to the building. The defendant knew of this at once. She did not remove her building, but suffered it to remain upon the land of which the plaintiff held the lease. She thus became as to the building the tenant at sufferance of the plaintiff. *Lash* v. *Ames*, 171 Mass. 487, 490. *Benedict* v. *Morse*, 10 Met. 223, 229. All parties treat the building as personal property. Its character is also inferable from the statement in the exceptions that for several years previous to the beginning of the present controversy the defendant had been tenant at will occupying this land with her building. This tenancy was terminated by the lease of the land to the plaintiff. After this lease the building was at best personal property of the defendant. *Emerson* v. *Somerville*, 166 Mass. 115. *Emery* v. *Boston Terminal Co.* 178 Mass. 172, 186. To regard it as personal property is most favorable to the defendant, for if it was a part of the real estate it passed to the plaintiff by her unqualified lease of the land from its owners.

The defendant, having become as to her building the tenant at sufferance of the plaintiff, was liable by statute, in the absence of special agreement, to pay a reasonable rent for the land upon which stood her building. R. L. c. 129, § 3. This was the relation subsisting between Miss Swift as lessee for a term of the land and Mrs. Boyd as her tenant by sufferance in occupying the land with her building.

At the same time there existed another relation between them

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from which all the trouble springs. Mrs. Boyd owned the building, and Miss Swift used it for a store. Previous to July 1, 1902, the latter had paid to Mrs. Boyd a stipulated recompense for its use. Thereafter the hire to be paid for this chattel was the subject of discussion between the parties. There was some evidence that Mrs. Boyd demanded of Miss Swift as such hire that the latter should relieve her from ground rent and pay beside $18 per month in cash, which was subsequently raised to $20 per month, and that Miss Swift refused to accede to this demand. In this state of affairs Miss Swift for a considerable time paid the money demanded month by month, reserving all her rights to recover rent of Mrs. Boyd for the use of the land.

These being actions to recover money claimed to be due for rent, the burden was upon the plaintiff Swift to prove that she was entitled to rent by a preponderance of the evidence. Looking at the relation of the parties solely in the light of the tenancy at sufferance, the plaintiff, having established the fact of such tenancy, was entitled to recover. But that was not their only relation. There was another growing out of the use by Miss Swift for a store of the building belonging to Mrs. Boyd. There was evidence tending to show that touching this subject the parties had such conversation and correspondence that the jury might find that they agreed that the rent due from Mrs. Boyd as tenant at sufferance of Miss Swift should be paid by the latter's use of the store at a cash compensation fixed in view of the additional part payment by this rent. The answer of the defendant Boyd in each action contains an averment of payment. Upon this issue the burden of proof was upon her. *Burnham* v. *Allen*, 1 Gray, 496, 502. *Temple* v. *Phelps*, 193 Mass. 297.

In other words the plaintiff's case was made out by the statute according to the terms of which a tenant at sufferance is liable for rent. Then the burden was upon the defendant to prove her independent defense of payment, in avoidance of a proven liability. The claim of the defendant, although not stated with perfect clearness, amounted not to a rebuttal of the existence of tenancy by sufferance, but to an independent fact in avoidance of a present obligation to pay rent due under that tenancy, namely, that she had made a contract with a plaintiff, by the terms of which the rent thus due was to be applied by the plaintiff in part

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payment of a debt owed from her to the defendant for the use of the building. This is what we understand the presiding judge meant when he told the jury (this being the only part of the charge excepted to) that the "defendant Boyd must show that the plaintiff Swift agreed not to charge her any land rent after Miss Swift, the plaintiff, had taken the lease, and that defendant Boyd would be liable to pay said land rent unless she was excused from so doing by the plaintiff Swift." While this is not expressed in the concise and accurate phraseology necessary in a nice analysis of the legal rights of the parties, it does not appear to be a failure to use such practical language as to convey to the jury an adequate guide to ascertain where the truth lay as matter of fact and do justice between the conflicting claims of the parties.

The rulings requested by the defendant were properly refused. All of them contain the element that assertion by Mrs. Boyd, that she would pay no rent after the plaintiff procured the lease of the land, was a vital and possibly decisive fact. Such refusal in itself was of no consequence. By continuing to occupy the plaintiff's land with her building, the defendant was made liable for rent by the statute. Her refusal to recognize that she was bound by the law had no effect upon the rights of the parties. It is suggested in argument by the defendant that the plaintiff had no right respecting the store building under her lease from the owners of the land. This argument is fallacious. There is no evidence that the defendant had any right in the building, except that arising from her ownership of a chattel so bulky in its nature that she was obliged to use land for its storage. There is no suggestion in the evidence that the plaintiff's lease of the land was subject to the building. The defendant had no right to continue it on the plaintiff's land after the termination of her tenancy at will without paying rent, in the absence of a special agreement, no matter how vigorously she might deny such liability.

Exceptions overruled.

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SAMUEL L. CORSE *vs.* JOHN G. DEXTER.

Plymouth. December 10, 1908. — May 19, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Watercourse. Mills and Mill Privileges. Covenant, Against incumbrances.

The right of the owner of land through which a watercourse flows, to dam its waters and use the head of water thus acquired for the running of a saw mill at all seasons of the year in a proper manner and in the usual way in which such mills are operated, is a right inseparably connected with the ownership of the land and does not depend upon the acquisition by deed or prescription of rights above or below the dam, nor does such use create any easement in lands below the dam; and therefore such right of an upper riparian owner is not an incumbrance upon land conveyed by a lower riparian owner and does not constitute a breach of a covenant against incumbrances contained in the deed under which such land is conveyed.

CONTRACT for breach of a covenant against incumbrances contained in a deed of land from the defendant to the plaintiff. Writ in the Superior Court for the county of Plymouth dated August 14, 1906.

The case was tried before *Hardy*, J. The facts are stated in the opinion. The jury found for the plaintiff; and the defendant alleged exceptions.

F. M. Sparrow, for the defendant.

D. T. Devoll, for the plaintiff.

MORTON, J. This is an action of contract to recover for breach of a warranty against incumbrances. The premises to which the action relates are situated in Rochester upon a brook or stream called "Cedar Swamp Brook." A part of it is also known as "Dexter River," and another part as "Haskell Brook." The premises consist in part of upland and in part of bog or swamp land. It is only in regard to the bog or swamp portion of the premises, comprising about an acre, that it is contended that there has been a breach of the covenant. A short distance below the plaintiff's land is an old dam called the "Dexter Mill Dam," over which a road passes. There was formerly a mill called the "Dexter Mill." The mill had not been operated for thirty to thirty-five years, and it and the dam had fallen into decay. Above the plaintiff's premises is a mill called the "Haskell Mill"

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and a dam which had been operated and maintained for thirty years or more. The plaintiff had heard and he understood at the time that he purchased the land in question of the defendant that the right of the owners of the "Haskell Mill" was restricted so that from the middle of April to some time in September they could only let down water enough to run a full brook. It did not appear, if material, that any representation to that effect was made by the defendant to the plaintiff before the execution and delivery of the deed. The plaintiff bought the land because he thought it suitable for a cranberry bog, and after purchasing it he proceeded to make it into a cranberry bog by levelling it, sanding it, ditching it, setting out vines upon it, and by altering the course of the brook. The result was that the land was flooded by water let down in the operation of the Haskell Mill and held back by the Dexter Mill Dam three times, as the plaintiff testified, during the first summer, and the sand and vines were washed away. The plaintiff thereupon abandoned work on the bog and brought suit against the owners of the Haskell Mill. It does not appear what has become of that suit. The incumbrance which, it is alleged, exists, is a right on the part of the owners of the Haskell Mill, acquired by prescription or deed, to flood the land in the operation of their mill during the summer months from April to September. There was a verdict for the plaintiff and the case is here on exceptions by the defendant, which include amongst others an exception to the refusal of the presiding judge to rule as requested that upon all the evidence the plaintiff was not entitled to recover.

We think that the ruling requested should have been given. The Haskell Mill, it appears, was a saw mill with about eight and one half feet fall and a mill pond of about three hundred and fifty acres. No contention is made that the mill was not appropriate to the size and capacity of the stream and the quantity of water usually flowing therein, or that, when operated, it was not operated in a reasonable and proper manner, or in the usual and ordinary way in which such mills are operated. In the absence of any restriction to the contrary the owners of it had the right to operate their mill at any and all seasons of the year, and there was nothing to show that there was any such restriction. The creation of a head and fall of water and the use of it for mill pur-

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poses necessarily interfere with the natural flow of the stream. The right thus to use the waters of a stream is inseparably connected with the ownership of land through which a watercourse flows. It does not depend upon the acquisition by deed or prescription of rights above or below the dam, nor does the exercise of the right in a proper and reasonable manner create any easement in lands below the dam. If the water is let down in an unusual and extraordinary manner and at unusual times and in unreasonable quantities, it may, if continued long enough, result in the acquisition of prescriptive rights by the owners of the mill as against riparian owners lower down. In the present case the mill was operated in a proper manner and in the usual way in which such mills are operated and there was nothing extraordinary or unreasonable in the way in which the water was let down. The flooding of the plaintiff's land resulted from the ordinary operation of the mill and the obstruction to the passage of the water caused by the Dexter Mill Dam. The owners of the Haskell Mill made no other or different use of the waters of the stream than they had a right to make, and they acquired thereby no prescriptive rights over the land belonging to the plaintiff. There was nothing to show any adverse user by them of the plaintiff's land. The plaintiff had the right to widen and deepen the brook where it flowed through his land for the purpose of facilitating the passage of the water, or to build dikes to keep his land from being flooded, or to adopt any other means for that purpose which did not interfere with or obstruct the flow of the brook to the injury of the owners of the Haskell Mill or of riparian proprietors farther down. There is nothing to show that the land was subject to an incumbrance as alleged. See *Cary* v. *Daniels*, 8 Met. 466; *Springfield* v. *Harris*, 4 Allen, 494; *Clapp* v. *Herrick*, 129 Mass. 292; *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396.

The conclusion to which we have come on the main question renders it unnecessary to consider the other rulings requested.

Exceptions sustained.

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WILLIAM M. CONANT *vs.* CHARLES R. EVANS.

Suffolk. November 10, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Evidence, Admissions and confessions. *Estoppel*. *Practice, Civil*, Further proof of admitted facts. *Contract*, Consideration.

In an action of contract to recover $1,000 for performing a surgical operation, in which the answer contained a general denial, the defendant admitted that the operation was performed at his request and also admitted that he owed the plaintiff whatever his services were reasonably worth. It appeared that there was no agreement as to compensation before the operation was performed, but that after the operation the plaintiff sent the defendant a bill for $1,000, and that a correspondence followed in which the defendant, although saying that he thought the charge was very high, repeatedly said in substance in his letters that he would pay the bill as soon as he could spare the money. The judge ordered a verdict for the plaintiff in the full amount claimed, and the defendant alleged exceptions. *Held*, that the statements of the defendant in his letters were competent evidence not only upon the question of liability but also in regard to the amount to be paid, and were not rendered incompetent by the defendant's admissions that the operation was performed at his request and that he owed the plaintiff whatever his services were reasonably worth, but that the admissions of the defendant and the statements in his letters were not conclusive either in regard to his liability or the amount to be recovered, and, it not having appeared that the plaintiff had done anything or had refrained from doing anything in reliance upon such admissions or statements, the defendant was not estopped to contest his liability or the amount to which the plaintiff was entitled; therefore, that the question what the services of the plaintiff reasonably were worth should have been left to the jury and the ordering of the verdict was erroneous.

Where, at the trial of an action of contract to recover compensation for services performed, in which the answer contains a general denial, the defendant admits that the services were performed at his request and that he owes the plaintiff whatever the services were reasonably worth, the plaintiff is not obliged to be content with these admissions but has a right to introduce evidence both as to the defendant's liability and as to the amount which the plaintiff is entitled to recover.

A promise to pay for services which already have been performed is without consideration.

CONTRACT for $1,000, as described in the opinion. Writ in the Municipal Court of the City of Boston dated June 22, 1906.

On appeal to the Superior Court the case was tried before *Hardy*, J. The action was brought to recover the compensation alleged to have been agreed upon for performing a surgical operation upon the defendant's son. The defendant admitted

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that the operation was performed at his request, and also admitted that he owed the plaintiff, after the operation had been performed, whatever the services were reasonably worth.

The letters of the defendant to the plaintiff, referred to in the opinion, contained, among other things, the following:

In a letter of January 12, 1905, was the following: "I would like to know if you would not be interested enough in the New England Storage Warehouse to take for your services ten shares of stock in the company and balance in cash when the same is issued to me, which will probably be before long. Under our prospectus, Mr. Woodruff and myself are entitled to $10,000 for carrying through the project and no stock has been sold to any one for less than $100 per share. The stock bears interest at the rate of 6 % per annum from the time it is paid for, and all of our subscribers think we have one of the best propositions that has ever been placed on the market."

In a letter of February 2, 1905, was the following: "The only reason I asked you to take ten shares of stock in part payment of your bill was that I have everything at the present time but money, and as the stock is exactly the same as money to me (we have raised at the present time some $300,000 and every one has paid in one hundred cents on the dollar with no guarantee of any kind) I thought possibly you might like the investment. When it comes the proper time for me to sell my stock, after I have placed the other, of course, I would just as soon pay you the money, and if you can wait until that time I will send you a check."

In a letter of March 18, 1905, was the following: "I thought your price of $1,000 was very high, but as I placed myself in your hands, I do not see that I really have anything to complain of. . . .

"Just as soon as I can spare the money, I will send you a check for your bill."

In a letter of August 2, 1905, was the following: "Regarding my bill, I do not see how I can say any more than I have said, that just as soon as I can spare the money I will send you a check."

At the close of the evidence, the defendant asked the judge to make certain rulings, among which were the following:

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"4. The statements made in the letters may be considered as admissions by the defendant, not that he owed $1,000 as alleged by the plaintiff, but only to the extent that he owed the defendant something. That amount must be a fair and reasonable recompense for the particular operation. What amount is fair and reasonable lies wholly within the province of the jury to determine. The statements in the letters and the sum stated in the bill are merely recitals of a past transaction and as such are not admissible to prove what amount would be reasonable.

"5. The letters of the defendant are inadmissible to prove the amount of the bill. Their only purpose would be to prove that the defendant admitted to the plaintiff a liability and to prejudice the jury. The defendant still admits a liability, though of a lesser amount than the plaintiff demands. Since the defendant makes this admission the letters become useless.

"6. What is a reasonable charge is a question of fact lying wholly within the province of the jury. With the evidence, the fact that, in many cases, the plaintiff has made smaller charges than in the present case, the jury are empowered to consider all the evidence and to decide on what is reasonable wholly irrespective of the bill rendered by the plaintiff."

"10. The mere fact that Mr. Evans did not object to the amount of the bill in his letter written after the fact, is not conclusive as to the reasonableness of the bill.

"11. Even if the letter from Mr. Evans to Dr. Conant written some months after the operation constituted a promise on his part to pay the bill, that promise was made without consideration and is therefore not binding on Mr. Evans and does not preclude him from contesting the reasonableness of the bill."

The judge refused to make any of the rulings requested by the defendant, and ordered the jury to return a verdict for the plaintiff in the full amount claimed. The jury returned a verdict for the plaintiff in the sum of $1,178.33; and the defendant alleged exceptions.

W. R. Evans, Jr., for the defendant.

H. D. McLellan, (*S. C. Bennett* with him,) for the plaintiff.

MORTON, J. This is an action of contract to recover for services rendered in performing an operation at the defendant's

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request on the defendant's minor son. The declaration is in three counts, the first alleging that the defendant employed the plaintiff to perform an operation on the defendant's son, which the plaintiff did, and that the defendant promised to pay the plaintiff the sum of $1,000 for his services, the second on an account annexed for services in operating on the defendant's son at his request, and the third alleging, like the first, that the plaintiff performed the operation at the defendant's request and then alleging that the defendant promised to pay what the services were reasonably worth, and that thereafter the plaintiff offered to accept and demanded of the defendant $1,000, and that the defendant promised to pay the same.

As we construe the first and third counts the promise alleged to have been made was made after the services were performed. This construction accords with the facts as they appeared in evidence at the time. The plaintiff did not contend and offered no evidence tending to show that the defendant promised to pay the sum named before the services were rendered and in consideration thereof. What he did contend was, in effect, that the defendant had made certain admissions in reference to the plaintiff's bill in a correspondence, which took place between the parties after the services had been rendered and which was introduced in evidence by the plaintiff, which conclusively established, as he contended, the defendant's liability for the sum named and constituted an agreement to pay it. The judge so ruled and directed a verdict accordingly, and the principal question presented by the bill of exceptions is whether this ruling and direction were right. We do not think that they were.

It is plain that the letters written by the defendant were competent so far as they contained any statements or admissions in relation to the matter in controversy, and the defendant's exception to their admission must, therefore, be overruled. Such statements and admissions were competent not only in regard to the question of liability, but also in regard to the question of amount, and they were not rendered incompetent by reason of the defendant's admission that the operation was performed at his request and that he owed the plaintiff whatever his services were reasonably worth. The answer was a general denial and

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the plaintiff was not obliged to accept or be content with the concessions or admissions made by the defendant in the course of the trial. *Dawson* v. *Boston & Maine Railroad*, 156 Mass. 127. *Dorr* v. *Tremont National Bank*, 128 Mass. 349, 360. *Priest* v. *Groton*, 103 Mass. 530, 540.

But the statements and admissions made by the defendant in the correspondence, while admissible as evidence on the question of his liability and the amount thereof, were not of such a nature as to be conclusive in regard to either his liability or the amount thereof. There was nothing to show that the plaintiff did anything or refrained from doing anything in reliance upon such statements or admissions, and there was, therefore, no ground on which the defendant was estopped to contest his liability or the amount to which the plaintiff was entitled. *Mackay* v. *Holland*, 4 Met. 69.

So far as the services that were rendered were relied upon to support the express promise alleged to have been subsequently made, it is settled that they did not furnish a sufficient consideration for such promise. *Massachusetts Mutual Ins. Co.* v. *Green*, 185 Mass. 306. *Moore* v. *Elmer*, 180 Mass. 15. *Chamberlin* v. *Whitford*, 102 Mass. 448. The defendant, therefore, should have been permitted to introduce evidence, as he offered to do, of what the services rendered were reasonably worth, and the case should have been submitted to the jury under proper instructions. Many of the questions now raised may not arise at another trial, and therefore we have not dealt with the defendant's requests in detail.

Exceptions sustained.

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GEORGE L. TILTON *vs.* JOHN Q. A. WHITTEMORE & another.

Plymouth. November 12, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction. *Guaranty.*

In an action of contract it appeared that by an agreement in writing the plaintiff agreed to buy of the defendant one thousand dollars' worth of the stock of a certain company, and the defendant agreed to repurchase the stock at the end of one year for the sum of $1,000, if the plaintiff so desired, and guaranteed to pay him "dividends amounting to not less than eight per cent per annum on the above one thousand dollars' worth of stock." The plaintiff received the stock and did not exercise his right to call upon the defendant to purchase it at the end of a year. He received dividends upon the stock at the rate of eight per cent per annum for one year and two months, and after that received no dividends whatever. He brought the action on the guaranty to recover the amount of $80 a year for the period that had elapsed since the payment of dividends had ceased. The judge, who heard the case without a jury, found for the defendant and gave judgment for him. Upon an appeal by the plaintiff, it was *held*, that the judgment should be affirmed; that, if the guaranty should be construed as running for a reasonable time, it would be difficult to say as matter of law that a finding that a reasonable time had elapsed at the end of fourteen months was wrong, but that the more reasonable construction of the agreement was that the guaranty was intended to be limited to the year to which the obligation to repurchase was limited, and therefore that all the dividends which were guaranteed had been paid.

MORTON, J. This is an action of contract to recover from the defendants unpaid dividends which the plaintiff alleges are due him from them by virtue of a written contract dated November 24, 1900, by which the plaintiff agrees to purchase of the defendants one thousand dollars' worth of Sedalia Copper Company stock at $10 per share on certain conditions, namely, that the defendants agree to repurchase the stock on November 24, 1901, for the sum of $1,000 if the plaintiff so desires, and that they guarantee to pay him "dividends amounting to not less than 8% per annum on the above one thousand dollars' worth of stock." We have stated the conditions in what seems to us their natural order and not in the order in which they occur in the contract.

The contract was duly executed by the parties, and the plaintiff paid for and received the stock as stipulated. Dividends

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were paid for fourteen months, till January 24, 1902, at the rate of eight per cent per annum, but none have been paid since, and the plaintiff seeks to recover in this action dividends at the rate of $80 a year from that date to November 23, 1906. The date of the writ was February 2, 1907. The plaintiff did not avail himself of the defendants' agreement to repurchase. It is possible that the dividends that were paid were paid by the defendants' procurement with an eye to that contingency, the last one having been paid only two months after the year expired; but there is nothing to warrant such a finding, if material. The case was heard by a judge * without a jury on agreed facts with power to draw inferences. The judge ordered judgment for the defendants, and the plaintiff appealed.

The case is not free from difficulty, but we think that the ruling was right. The guaranty admits of several constructions, — either that the dividends were to be paid as long as the plaintiff held the stock, or during the life of the corporation, or for a reasonable time, or for the year to which the obligation to repurchase was limited.

If the guaranty be construed as running for a reasonable time, then it would be difficult to say as matter of law that the finding which in that aspect of the case the judge must have made, that a reasonable time had elapsed when the last dividend was paid was wrong, and the judgment would have to be affirmed on that ground.

But, on the whole, we think that the more reasonable construction of the agreement is that the guaranty was intended to be limited to the year to which the obligation to repurchase was limited. We regard the guaranty rather as collateral to the agreement to purchase and repurchase than as an independent and separate agreement. The agreed facts state that it was not requested by the plaintiff but was offered by the defendants as an inducement to the purchase of which the agreement to repurchase must be deemed a part. As collateral to or an incident of the contract to purchase and repurchase it naturally would come to an end with the expiration of the time limited for the exercise by the plaintiff of the option to keep or return the stock. If the

* *Lawton*, J.

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plaintiff had availed himself of the defendants' agreement to repurchase the stock it could not be contended for a moment that the guaranty would have continued in force. And it seems hardly reasonable to suppose that the parties could have intended that the plaintiff should have the option to return the stock within a year and also, if he elected to keep it, an indefinite guaranty of eight per cent dividends. What was contemplated, we think, was that the plaintiff should have a year to make such investigations as he chose into the prospects of the company and the value of the stock, and to elect whether he would keep the stock or not, and that meanwhile the defendants would guarantee to pay him dividends at the rate of eight per cent per annum, and we think that the contract should be construed accordingly.

It is to be noted that the guaranty is not to pay annual dividends of eight per cent, but dividends at the rate of eight per cent per annum. The latter does not imply, as perhaps the former would, that the guaranty was to continue for more than a year. In *Rotch* v. *French*, 176 Mass. 1, it was held that the guaranty continued for a reasonable time. But there was no agreement to repurchase as in this case, and consequently nothing in the contract itself to limit the time during which the guaranty was to run.

Judgment affirmed.

C. C. King, for the plaintiff.

E. F. McClennen, for the defendants.

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JAMES P. BARRY *vs.* MICHAEL H. CURLEY.

Suffolk. November 17, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Payment. Assignment. Receipt.

In an action against a consignee of goods, which previously had been delivered, for freight charges, in which the plaintiff sued as the assignee of a transportation company to which the charges were alleged to be due from the defendant, and in which the defendant relied on the defense of payment, it appeared that the plaintiff was the head clerk in Boston of the transportation company, a Maryland corporation, whose corporation offices were at Baltimore, that the plaintiff, contrary to a rule of the company, delivered the goods to a teamster, who for years had received and paid for freight consigned to the defendant, without prepayment of the charges, that afterwards the teamster failed to pay the charges and the defendant refused to pay them, that thereupon the plaintiff paid the amount of the charges to his employer, the transportation company, and received from that company an instrument acknowledging the receipt from the plaintiff of the amount paid by him "covering freight and charges" on the shipments in question. The plaintiff testified that before the payment he explained the situation to the auditor of the company and that the auditor "was to get an assignment of the company from Baltimore," and that later the plaintiff received an instrument, which had been forwarded to Baltimore for execution, purporting to assign to the plaintiff the claim of the company against the defendant for the freight charges in question. The defendant contended that the claim of the transportation company had been extinguished upon its payment by the plaintiff, and could not be revived by the subsequent delivery of the assignment. *Held*, that there was evidence warranting a finding that the amount paid by the plaintiff to the transportation company was not paid in satisfaction of the freight charges but was paid for an assignment of the claim against the defendant and so was received by the transportation company, and that the plaintiff was entitled to recover against the defendant under the assignment.

CONTRACT to recover certain freight moneys alleged to be owed by the defendant to the plaintiff. Writ in the Municipal Court of the City of Boston dated December 13, 1904.

The answer contained a general denial and an allegation of payment.

On appeal to the Superior Court the case was tried before *Lawton*, J. The following facts appeared at the trial.

At the time the alleged bills were incurred, the plaintiff was the head clerk in Boston of the Merchants and Miners Trans-

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portation Company, a Maryland corporation running freight boats between Boston and Newport News, Virginia, with its corporation offices at Baltimore, Maryland.

The plaintiff brought this action as assignee of the rights of the Merchants and Miners Transportation Company, to recover certain freight charges alleged to be owed by the defendant on certain whiskey consigned to him in Boston.

A teaming firm named R. Johnson and Company received the freight in question from the Merchants and Miners Transportation Company and delivered it in Boston.

Most of the freight in question was intended for and was delivered to various firms in Boston and was consigned to the defendant with his consent, in carload lots, thereby obtaining carload rates from the railroad company to which it was delivered by the shipper. A part of the goods in question were received by the defendant for his own use and he testified that he had paid his share of the freight to R. Johnson and Company, the teamsters.

A part of the goods were for one Crowley and were received by the defendant who paid the freight on them, blending them in his rectifying store and then delivered them to Crowley. The whiskey was sold by and shipped from a distillery in Kentucky in which the defendant's brother was interested.

R. Johnson and Company had done all the trucking of the defendant for years and had received the defendant's freight from the Merchants and Miners Transportation Company and had paid for it for years.

The plaintiff always had delivered goods consigned as these were to the defendant to R. Johnson and Company, who usually had paid the entire freight on them.

The cashier of the Merchants and Miners Transportation Company testified that the defendant had once or twice on previous shipments of this character paid the freight on the entire shipment by his own check.

R. Johnson and Company were adjudged bankrupts shortly before the bringing of this action.

Neither the plaintiff nor any representative of the Merchants and Miners Transportation Company had any conversation or any correspondence with the defendant, or with his representa-

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tive excepting R. Johnson and Company, until after the failure of R. Johnson and Company.

It was against the rules of the Merchants and Miners Transportation Company, issued to its employees, for them to deliver freight without prepayment to consignees who were not on the credit list. The defendant was not on the credit list, and the plaintiff allowed R. Johnson and Company to have the freight in question without prepayment of the charges.

The plaintiff testified that the freight charges were paid by him to the Boston agency of the Merchants and Miners Transportation Company on April 8, 1904, $286.86, covering the freight and charges on the whiskey enumerated. These charges had not been paid by the defendant or by the teamster who received the delivery check from the freight cashier of the Merchants and Miners Transportation Company. The plaintiff had seen the defendant in regard to paying these freight charges and could not secure the funds from him, so he paid the amount of the charges to the company and received in return the receipt in evidence, and later received the assignment from the treasurer of the Merchants and Miners Transportation Company at Baltimore, Maryland, after it had been made out by the attorneys here in Boston and had been forwarded to Baltimore for execution.

The plaintiff testified that before he paid the money he made an explanation of the situation to the auditor of the company, and "that he was to get an assignment of the company from Baltimore." The auditor was P. W. Kennedy, who signed the assignment as a witness. He happened to be in Boston at the time the plaintiff paid the money and the receipt was given to him. Afterwards the plaintiff testified further on this subject that before he paid the money he made an explanation through the auditor in charge of the accounts. The judge then asked him this question: "But you say that at that time there was no talk on the part of the auditor about sending any assignment?" To this the plaintiff answered, "Not definitely, no. No, there wasn't any definitely, relative to sending an assignment." Then he was asked by his counsel, "But you had a talk, the money was paid, and then the assignment came?" The plaintiff replied, "The assignment was sent afterwards. Mr. Kennedy is

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the witness to the signature of the treasurer. He was the auditor for the company."

The receipt mentioned above was as follows:

"Merchants & Miners Transportation Company.

$286.86 Boston, April 8th, 1904

"Received of James Barry Two Hundred and Eighty-six 86—100 Dollars, covering freight and charges on shipments of whisky consigned to M. H. Curley as follows: —

"S. S. Howard	Voyage	$839	Entry	$2015 – 55.76
Gloucester	"	888	"	2006 – 27.00
"	"		"	2007 – 90.40
"	"		"	2008 – 54.05
"	"	887	"	2021 – 59.65
				$286.86

"A. M. Graham, Agt.
"H. L. Howe"

The assignment mentioned above was as follows:

"Know all men by these presents that the Merchants & Miners Transportation Company, a corporation duly organized by law, and having a usual place of business in Boston in the County of Suffolk and Commonwealth of Massachusetts, in consideration of one dollar and other valuable considerations to it paid by James Barry of said Boston, the receipt whereof is hereby acknowledged, does hereby assign and transfer to said James Barry all contract rights, claims, demands and causes of action which it now has, and which at any time hereafter it may and shall have against Michael H. Curley of said Boston for an account on account of freight and charges on shipments of whiskey consigned to said Michael H. Curley as follows:

"SS. Howard	voyage $839, entry 2015,	55.76
SS. Gloucester,	voyage 888, entry 2006,	27.
SS. Gloucester,	voyage $888, entry 2007,	90.40
SS. Gloucester,	voyage $888, entry 2008,	54.05
SS. Gloucester,	voyage $887, entry 2021,	59.65
	"Total,	286.86

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"To have and to hold the same to said James Barry his executors administrators and assigns forever. And the said Merchants & Miners Transportation Company does hereby constitute and appoint the said James Barry and his assigns to be its attorney irrevocably in the premises to bring suit and to do and perform all acts, matters and things incident thereto, and touching the premises in the like manner to all intents and purposes as it could.

"In witness whereof the Merchants & Miners Transportation Company by its Treasurer, thereunto duly authorized, has hereunto set its hand and seal.

"Merchants & Miners Transportation Co.
by

"Signed, sealed and delivered in the presence of P. W. Kennedy" J. H. Robinette Treasurer" (Corporate seal.)

The judge submitted the following issue to the jury with full, proper and sufficient instructions on the question whether the transaction was an assignment: "Did the Merchants and Miners Transportation Company make a valid assignment to the plaintiff?" The jury answerd, "Yes."

The judge also submitted to the jury under full, proper and sufficient instructions the following question: "Did the Merchants and Miners Transportation Company intend to hold Curley liable for the freight charges in question and were they authorized so to do by Curley?" The jury answered, "Yes."

The judge thereupon ruled that the evidence was not sufficient to warrant the first finding, ordered a verdict for the defendant, and reported the case for determination by this court.

It was agreed that if this court should rule that there was not sufficient evidence for the jury as to whether the above transaction operated as an assignment to the plaintiff of the claims of the Merchants and Miners Transportation Company against the defendant for the freight charges in question, judgment was to be entered for the defendant upon the verdict; but, if this court should rule that there was sufficient evidence for the jury of an assignment, judgment was to be entered for the plaintiff in the sum of $298.80, with interest from the date of the writ.

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F. Burke, (*J. P. Bell* with him,) for the plaintiff.

G. F. Ordway, for the defendant.

MORTON, J. The sole question in this case is whether what took place between the plaintiff and the auditor of the Transportation Company upon receipt by the latter from the plaintiff of the amount of the Transportation Company's demand against the defendant operated as a payment and satisfaction of it or as an assignment of it. If the amount was tendered and received as a payment it extinguished the demand. Whether it was so tendered and received or not depended on what the understanding was at the time when the Transportation Company received the money. If the amount was then tendered and received as a payment, no afterthought or subsequent understanding could revive the demand in the plaintiff's favor, though if it was tendered and received for an assignment the parties could afterwards agree that it should be regarded as a payment. We think that there was evidence warranting a finding that an assignment and not a payment was intended and that the money was so paid by the plaintiff and so received by the Transportation Company.

In the first place the language of the receipt was peculiar. It was not a receipt of the sum named as payment of the freight and charges, as would have been more natural if the sum named had been taken in satisfaction of the demand, but it was a receipt of the sum named as "covering" freight and charges. This was or could be found to have been more consistent with an assignment than a payment having been intended. Again, in answer to questions put by the presiding judge, the plaintiff, though saying at first that he had no talk with the auditor before paying the money about the assignment that was subsequently sent to him, finally said that he thought that before he paid the money to the auditor he explained the situation to him "and that he was to get an assignment of the Company from Baltimore." It is true that later he modified this somewhat. But it was for the jury to say what weight should be given to his testimony. It could not be ruled as matter of law, we think, that it did not warrant them in finding, as they did, that the Transportation Company made a valid assignment to the plaintiff.

Still further, the circumstances under which the plaintiff

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apparently became liable to the Transportation Company were such as to render it not unreasonable to say the least to suppose that the Transportation Company desired to assist him so far as it properly could and for that reason intended the transaction to take the form of an assigment rather than of a payment.

The result is that according to the terms of the report judgment will be entered for the plaintiff for $298.80 with interest from the date of the writ.

So ordered.

JOHN A. GAFFEY *vs.* UNITED SHOE MACHINERY COMPANY.

Middlesex. November 17, 18, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Construction, Performance and breach. *Damages.*

In an action for the alleged breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, a corporation which then was putting up some new buildings, to crush the rock to certain specified sizes and deliver the crushed rock as therein specified, it appeared that the defendant undertook to terminate the contract as soon as the buildings were completed but before the whole of the ledge was removed, and prevented further performance on the part of the plaintiff, contending that under the contract the plaintiff was to crush only so much of the ledge as should be needed in the construction of the new buildings and that it had a right to terminate the contract as it did. The contract, among other things, contained the following: "That whereas the owner desires to secure the removal of a certain ledge . . . of rock situated upon its premises . . . and whereas the contractor desires to undertake and carry on such work of removal . . . Now, therefore, . . . One. The contractor undertakes and agrees, subject to the provisions hereof and to the directions of the engineer in charge, to excavate and remove the ledge . . . Five. The owner shall furnish at convenient central points about the ledge . . . the necessary power . . . Six. . . . the contractor shall thoroughly wash and cleanse the ledge before the same is blasted or excavated . . . The owner is thoroughly to strip the earth and soil from the ledge as rapidly as is required." It further was provided that the "excavation and removal shall be to grade thirteen or such other grade as may be specifically designated by the said engineer," and a provision was made for "changing the grade to which the ledge or any portion thereof shall be levelled." It further was provided that "The contractor shall use the chips and loose stones not crushed in filling up hollows in the ledge caused by the work of excavation, to the end that upon the completion of the work the ledge shall be substantially at the grade or grades designated." The only reference in the contract to buildings in process of construction was a provision that if work upon the build-

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ing was suspended by strikes the engineer might order the prosecution of work under the contract suspended. *Held*, that the contract was one for the removal of the entire ledge, and that the defendant had no right to terminate the contract upon the completion of its buildings.

In an action for the alleged breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, the contract contained a provision that the "excavation and removal shall be to grade thirteen or such other grade as may be specifically designated" by the defendant's engineer. There was a further provision that "The engineer in charge may at any time during the progress of the work give written notice to the contractor, as hereinbefore provided, changing the grade to which the ledge or any portion thereof shall be levelled, and the grade so designated shall be in substitution of the grade thirteen mentioned in this instrument." The defendant's engineer gave to the plaintiff a notice, purporting to be under this clause, that thereafter the grades would be eighteen and twenty-three instead of thirteen. The plaintiff refused to acquiesce in this change on the ground that it was not warranted by the contract, and thereupon the defendant virtually put a stop to the work and prevented the plaintiff from completing it. An auditor to whom the case was referred found that the effect of the change of the grade from thirteen to eighteen and twenty-three was that only a small amount would be excavated from the top of the ledge, and that the change was made by direction of an officer of the defendant for the purpose of terminating the plaintiff's work. At the trial the defendant's engineer testified on cross-examination that "he did not know of any purpose to which the tops of the ledges levelled off to grade twenty-three and grade eighteen could be put" and that his object in changing the grade was to stop the plaintiff from working further. The presiding judge instructed the jury that "The engineer under the terms of the contract . . . was authorized to make any change of grade incidental to the purpose of carrying out the provisions of the contract, — that is, for the purpose of taking away the ledge, — but he had no authority . . . to change the grade to an impracticable grade for the purpose, and simply for the purpose, of terminating the contract." On exceptions alleged by the defendant after a verdict for the plaintiff, it was *held*, that the instruction of the judge was correct; that, by the only reasonable construction of the provision of the contract, the defendant's power to change the grade did not include the power to change it so as to abrogate the contract, but gave the defendant authority to make only such reasonable changes as would render the removal of the ledge when completed more satisfactory to it.

In an action, by a contractor against a corporation, for a breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, to crush the rock to certain specified sizes and deliver the crushed rock as therein specified, where it appeared that the defendant, under an erroneous construction of the contract, wrongfully undertook to terminate it before the whole of the ledge was removed and prevented further performance on the part of the plaintiff, the plaintiff, upon the question of damages, showed that he had made a sub-contract for a stone crusher with an engine and an engineer to run it, a boiler, cars and other equipment required to crush the stone into the sizes called for by his contract with the defendant, and, subject to the defendant's objection and exception, was allowed to put in evidence the price which he was required by the sub-contract to pay for what was furnished. The judge properly instructed the jury that the plaintiff was entitled to recover as damages, if he prevailed, the difference, if any,

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between what it would have cost him to complete the work according to the contract and the sum which he was to receive therefor. *Held*, that the case of *Smith* v. *Flanders*, 129 Mass. 322, seemed to be decisive in favor of the admissibility of the evidence, but that, even if the evidence was admitted wrongly, the defendant could not have been harmed by its admission, as the cost of completing the work would not be enhanced by the existence of the sub-contract and might be diminished by it.

MORTON, J. This is an action of contract to recover damages for the breach by the defendant of a written contract between it and the plaintiff according to which as the plaintiff contends he was to excavate rock from and remove a ledge on the defendant's premises in Beverly, crush the rock to certain specified sizes, and deliver the crushed rock as provided in the contract. The breach complained of was the defendant's action in refusing to allow the plaintiff to go on with the contract, he being ready and willing to do so. There was a verdict for the plaintiff and the case is here on the defendant's exceptions.

The first question relates to the construction of the contract. The defendant contends that according to the true construction of the contract the plaintiff was only to excavate and crush so much of the ledge as should be needed in the construction of new buildings and that when the buildings were completed it had a right to terminate the contract as it did. It also contends that the changes of grade ordered by the defendant's engineer came within the terms of the contract and did not constitute a breach of it. The plaintiff contends, on the other hand, that the contract is for the removal of the entire ledge, and not merely for so much as would have to be removed to furnish the crushed stone required for the construction of certain buildings. He also contends that the change of grade ordered by the defendant's engineer was not warranted by the contract.

It is plain we think that the construction contended for by the plaintiff, and which was the one adopted by the presiding judge,* is the correct one. The contract begins by reciting, "That whereas the owner desires to secure the removal of a certain ledge . . . situated upon its premises at Beverly . . ., and whereas the contractor desires to undertake and carry out such work of removal . . .," and then proceeds "Now, therefore,

* *Stevens*, J.

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. . . One. The contractor undertakes and agrees, subject to the provisions hereof and to the directions of the engineer in charge, to excavate and remove the ledge . . ." etc. The reference here is to the ledge and its removal as a whole and there are corresponding references in other provisions of the contract. Thus in article "Five" it is provided that "The owner shall furnish at convenient central points about the ledge . . . the necessary power," etc. In article "Six" it is provided that "The contractor shall thoroughly wash and cleanse the ledge before the same is blasted or excavated," etc., and that "The owner is thoroughly to strip the earth and soil from the ledge as rapidly as is required," etc. In article "One" it is provided that the "excavation and removal [referring evidently to the excavation and removal of the entire ledge] shall be to grade thirteen (13) or such other grade as may be specifically designated by the said engineer," and in article "Ten" provision is made for "changing the grade to which the ledge or any portion thereof shall be levelled." In article "Fourteen" it is further provided that, "The contractor shall use the chips and loose stones not crushed in filling up hollows in the ledge caused by the work of excavation, to the end that upon completion of the work the ledge shall be substantially at the grade or grades designated." All of these various provisions contemplate, we think, the removal of the entire ledge and not of such portion as may be required to furnish the crushed stone for buildings in the process of construction.

The only reference to buildings in process of construction in the entire contract is in article "Ten," and the reference there is simply for the purpose of providing that if work upon the buildings is suspended by strikes the engineer may order the prosecution of work under the contract to be suspended also. There is nowhere in the contract any provision that the ledge shall be removed only so far as may be necessary to furnish material for the construction of the buildings which the defendant was erecting, and there is no provision that upon completion of such buildings the contract shall or may be terminated. The auditor found that the main purpose of the defendant in having the ledge excavated was to obtain material for new buildings, and that no clause was inserted in the contract limiting the amount to be excavated because the defendant supposed that approxi-

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mately the whole ledge would be required to supply the stone needed for the buildings. But he also found that the defendant was desirous to have the ledge removed and the portion of its premises occupied by it brought down to a level grade suitable to be grassed over or used for additional buildings or railroad tracks and that that was one of its purposes in having the ledge excavated and removed. There was therefore nothing in the circumstances under which the contract was entered into which required or warranted a different construction from that given to the contract by the presiding judge.

The contract provided in article "One," as already observed, "that the excavation and removal shall be to grade thirteen (13) or such other grade as may be specifically designated by the said engineer"; and it further provided in article "Ten" that "The engineer in charge may at any time during the progress of the work give written notice to the contractor, as hereinbefore provided, changing the grade to which the ledge or any portion thereof shall be levelled, and the grade so designated shall be in substitution of the grade thirteen (13) mentioned in this instrument." The defendant, assuming to act under these provisions in the contract, gave notice to the plaintiff on April 2, 1907, that thereafter the grades would be eighteen and twenty-three instead of thirteen, and on the plaintiff's refusal to acquiesce in the change as warranted by the contract virtually put a stop to work under the contract, and prevented the plaintiff from performing the contract. The auditor found that the effect of the change from grade thirteen to grades eighteen and twenty-three was that only a small amount would be excavated from the top of the ledge and that the change was made by direction of an officer of the defendant corporation for the purpose of terminating the plaintiff's work under the contract. At the trial the defendant's engineer testified on cross-examination, amongst other things, that "he did not know of any purpose to which the tops of the ledges levelled off to grade twenty-three and grade eighteen could be put," and that his object in changing the grade was to stop the plaintiff from further working. The presiding judge instructed the jury that "The engineer under the terms of the contract . . . was authorized to make any change of grade incidental to the purpose of carrying out the provisions of the

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contract, — that is, for the purpose of taking away the ledge, — but he had no authority . . . to change the grade to an impracticable grade for the purpose, and simply for the purpose, of terminating the contract." We think that these instructions were correct. The power to change the grade did not include the power to change it so as to abrogate the contract, but was intended to give the defendant authority to make such reasonable changes during the progress of the work as would render the removal of the ledge when completed more satisfactory to it. So construed the provision is a reasonable one. Construed as the defendant contends it should be it would be altogether unreasonable, and cannot be presumed to have been within the contemplation of the parties.

The plaintiff made a sub-contract for a stone crusher with an engine and an engineer to run it, boiler, cars and other equipment required to crush the stone into the sizes called for by his contract with the defendant, and, subject to the defendant's objection and exception, was allowed to put in, as bearing on the question of damages the price which he was required to pay for what was thus furnished.

The plaintiff was entitled to recover as damages, if he prevailed, the difference, if any, between what it would have cost him to complete the work according to the contract and the sum which he was to receive therefor, and the judge so instructed the jury in accordance with the defendant's request. *Fox* v. *Harding*, 7 Cush. 516. *Smith* v. *Flanders*, 129 Mass. 322. *Magnolia Metal Co.* v. *Gale*, 189 Mass. 124. The case of *Smith* v. *Flanders*, 129 Mass. 322, would seem to be decisive in favor of the admissibility of the evidence.

But we fail to see how the defendant could have been harmed even if the evidence was wrongly admitted. The measure of damages was, as already observed, the difference between the contract price and the cost of completing the work, and the jury were so instructed, and the instruction was repeated more than once. Whether in estimating the profits which the plaintiff would have made if he had been allowed to complete the contract the jury included as part of it the profits which the sub-contractor would be entitled to recover by way of damages from the plaintiff for breach of the sub-contract, or whether in estimating the

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profits they disregarded the sub-contract and estimated them as an entirety, was immaterial. The cost of completing the work and the profits or damages to which the plaintiff was entitled would be the same in either case. The damages were not and could not have been enhanced by anything that was said or done in regard to the sub-contract. If the admission of the sub-contract had any effect it would seem to have helped rather than to have harmed the defendant.

We see no error in the rulings and instructions or the refusals to rule and instruct of the presiding judge.

Exceptions overruled.

W. B. Farr, (*N. B. Todd* with him,) for the defendant.

E. A. Whitman & H. W. Barnum, for the plaintiff.

EDWARD F. PORTER *vs.* LEWIS W. HOWES & another.

Suffolk. December 2, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Equity Pleading and Practice, Appeal. *Equity Jurisdiction*, To redeem from equitable mortgage. *Payment*. *Adverse Possession*.

Upon an appeal from a decree made by a judge who heard the case upon oral evidence, which was taken by a commissioner and all of which is before the court, the findings of the judge contained in a memorandum filed by him will not be disturbed unless upon all the evidence they appear to be clearly wrong.

In a suit in equity, in which the bill alleged the existence of an equitable mortgage created by a deed of certain real estate from the plaintiff to the defendant executed and delivered thirty-one years before the filing of the bill and an instrument executed on the same day by the defendant agreeing to reconvey the real estate on the payment of all indebtedness for professional services rendered and to be rendered by the defendant for the plaintiff, the judge who heard the case found, upon evidence which warranted his findings, that, three years after the instruments described in the bill were executed and delivered, the defendant, having rendered many services to the plaintiff for which he never had been paid, asked the plaintiff for money on account, but that the plaintiff was unable to give him any, that the defendant stated that his bill was very much in excess of the value of the property, that it then was agreed orally that the plaintiff would surrender all claim or right to a reconveyance, and that from that time on the defendant collected the rents, paid the taxes, made repairs and managed the property as absolutely his own, rendering no account, that the agreement of reconveyance previously executed by the defendant was not

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redelivered to him for the reason that he did not deem this necessary, that thereafter the defendant never presented any bill to the plaintiff and that the plaintiff never asked for one and made no offer of payment, that some correspondence took place between the plaintiff and the defendant at long intervals, in which no claim was made by the plaintiff to any right or interest in the property, and that no reference was made by the plaintiff to any such right from the time he orally agreed to surrender all right or claim to a reconveyance of the property until twenty-eight years later, when he filed his bill. The judge made a decree that the bill be dismissed, and the plaintiff appealed. *Held*, that the decree should be affirmed; that it was not necessary to inquire whether the original transaction constituted a conveyance in trust or equitable mortgage, or whether it was a simple agreement by the defendant to reconvey the real estate upon being paid within a reasonable time the amount which should be due to him for his services, because it could have been found that the plaintiff, twenty-eight years before the filing of his bill, had surrendered any right or claim to a conveyance, and that what took place at that time operated as a payment of the defendant's bill, *pro tanto* at least, if not in full, and an acceptance of the property by the defendant as such payment, and also because it could have been found that, if the plaintiff ever had any right in or to the property as mortgagor or *cestui que trust*, he had lost it by reason of the adverse possession of the property by the defendant under a claim of right and with the knowledge of the plaintiff for a period of more than twenty years.

BILL IN EQUITY, filed in the Superior Court on October 12, 1907, alleging an equitable mortgage created by the conveyance on January 25, 1876, by the plaintiff to the defendant Howes of a certain parcel of real estate on Bremen Street in that part of Boston called East Boston, and by an instrument executed by the defendant Howes on the same day as follows: "Boston, Jan. 25, 1876. Recd of Edward F. Porter a deed of real estate in East Boston consisting of a lot of land and stable thereon, and which is to be reconveyed to him on payment of all indebtedness to me and G. A. Somerby & Sohier & Welch or either of us on account of services rendered or which any or all of us may render for him he having retained us as his attorneys in all matters. L. W. Howes."

The bill prayed, among other things, for an accounting and a reconveyance.

In the Superior Court the case was heard by *Gaskill*, J., who made a memorandum of findings containing the facts which are stated in substance in the opinion. The judge made a final decree that the bill be dismissed; and the plaintiff appealed.

H. P. Brown, for the plaintiff.

H. G. Allen, (*L. W. Howes* with him,) for the defendants.

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MORTON, J. The plaintiff contends that the deed from him to the defendant Howes, and the agreement signed and delivered by the respondent to the plaintiff, which the judge found was a part of the same transaction with the execution and delivery of the deed, together constituted either an equitable mortgage or a conveyance in trust, and he seeks an accounting by the defendant Howes, whom we shall speak of as the defendant, and a reconveyance upon payment by him of what, if anything, shall be found due from him to the defendant.

The case was heard by a judge of the Superior Court upon oral evidence which was taken by a commissioner, and is all before us. The judge filed a memorandum of his findings, and in accordance therewith a decree was entered dismissing the bill. The plaintiff appealed.

The general rule is well settled that in a case, heard as the one before us was, the findings of the judge who heard it will not be disturbed unless upon all the evidence they appear to be plainly wrong. *Jennings* v. *Demmon*, 194 Mass. 108. *Reed* v. *Reed*, 114 Mass. 372.

The judge found that at the time when the deed was executed and was delivered by the plaintiff to the defendant the relation of client and counsel existed between them, and that a large amount of litigation in which the plaintiff would be involved was anticipated. Some suits had been brought against him and many others followed, and the defendant acted as attorney for the plaintiff in all of them — about twenty in all. Most of the services rendered by the defendant to the plaintiff were performed between January, 1876, and January, 1880, the cases being finally disposed of largely in 1877, 1878 and 1879, all but two before 1883, one in 1883 and the last in 1887. No money was ever paid to the defendant except a small sum in 1877 or 1878 on account of the expenses in one of the cases. The plaintiff had no money that he could conveniently pay to the defendant, being embarrassed by reason of attachments on his property and judgments against him. It was agreed at the time that the deed was executed and delivered that the plaintiff should for a time collect and retain the rents, and he did so till May or June, 1879, and paid the taxes for 1876 and 1877. In May or June, 1879, the defendant asked the plaintiff for money on account, but the

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plaintiff was unable to give him any and the defendant stated that his bill was very much in excess of the value of the property; and it was then orally agreed that the plaintiff would surrender all claims or right to a reconveyance, and from that time on the defendant collected the rents, paid the taxes, made repairs and managed the property as absolutely his own. The agreement was not delivered to the defendant for the reason that he did not deem it necessary that it should be given up to him. No bill was ever rendered by the defendant to the plaintiff, and after 1880 the plaintiff never asked for one and made no offer of payment, and the defendant has made no effort to collect his bill except so far as the property in suit is concerned. Some correspondence took place at long intervals before 1907, but no claim to any right or interest in the property and no reference to any claim or right was made by the plaintiff from May, 1879, when the plaintiff surrendered as aforesaid all claim to the property or to a reconveyance, till September, 1907, when the plaintiff made what was, in effect, a demand for an accounting and a reconveyance, which was refused by the defendant, and thereupon this suit was brought.

Though there was a conflict of evidence in regard to some of these findings, they were well warranted, and, in view of them, we do not see how it can be said that the decree dismissing the bill was erroneous.

It is not necessary to inquire whether the original transaction constituted a conveyance in trust or an equitable mortgage, as to which see *Campbell* v. *Dearborn*, 109 Mass. 130, and *McDonough* v. *Squire*, 111 Mass. 217, or whether it was a simple agreement for reconveyance by the defendant upon being paid within a reasonable time the amount which should be due him for his services. What took place in May or June, 1879, constituted, or could be found to constitute, (the findings are not so clear in that respect as could be desired), a giving up of the property by the plaintiff and a surrender by him of any right or claim to a reconveyance as a payment, *pro tanto* at least, if not in full, of the defendant's bill, and an acceptance of the property as such payment by the defendant. In view of the subsequent conduct of the parties such would seem to be the only reasonable explanation of the transaction which is found to have then taken place.

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It could also have been found, and we construe the memorandum of the presiding judge as meaning that he so found, that from May or June, 1879, the defendant has been in continuous possession of the property not as trustee or mortgagee but under a claim of right in his own behalf in repudiation of any trust or mortgage, of all which the plaintiff has had notice and in which he has acquiesced, so that if the plaintiff ever had any right in and to the property as mortgagor or *cestui que trust* he has lost it by reason of long continued adverse possession on the part of the defendant.

The views which we have expressed as to the effect of the findings made by the presiding judge render it unnecessary to consider what the result would be if the relation of trustee and *cestui que trust* or mortgagee and mortgagor was originally created between the defendant and the plaintiff and had continued to exist.

Decree affirmed.

ELIZABETH M. COGAN & another *vs.* WILLIAM H. COGAN.

Suffolk. December 2, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Probate Court, Appointment of commissioner under Rule 35, Appeal, Framing of issues. *Insane Person. Guardian. Constitutional Law. Witness. Evidence.*

Where, upon an appeal from the decree of a single justice of this court affirming a decree of the Probate Court appointing a guardian of a person alleged to be insane, it appeared that the evidence had been taken down by a stenographer, who thereafter was appointed a commissioner to take the evidence under Equity Rule 35, this court did not find it necessary to pass upon the question whether a commissioner could be appointed in that way, as they affirmed the decree appealed from, assuming for the purposes of the case that the evidence was properly before them.

At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, the respondent conducted his case in person, and he also, against his protest, was called as a witness by the petitioners and testified as such, so that the justice who heard the case had the fullest opportunity to observe his manner and behavior, his physical condition, the way in which his mind appeared to work, the expression of his countenance, and the way he spoke and acted and appeared to

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feel in regard to matters that came up. There also was the testimony of an expert on insanity that in his opinion the respondent was of unsound mind, and there was evidence of acts and declarations of the respondent which could be found to tend to support that conclusion. *Held*, that the rule, in cases heard as this was, is that the finding of the single justice will not be set aside unless clearly erroneous, and that the court could not say that a finding that the respondent was insane was clearly erroneous.

At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, a motion of the respondent that issues may be framed to be submitted to a jury is addressed to the discretion of the justice who hears the case.

At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, the proceeding being of a civil and not a criminal nature, the respondent, against his protest, may be called and examined as a witness by the petitioner without the violation of any constitutional right.

At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, evidence of what the respondent testified at the hearing in the Probate Court is admissible, as also are a letter and a folder contained in it, incoherent in character, which were sent by the respondent to the receiver of his property appointed by the court, apparently being one of many similar communications addressed to different persons.

A letter sent by a person adjudged to be insane to a member of the bar appointed by the Probate Court receiver of his property is not in the nature of a privileged communication from client to counsel.

MORTON, J. This is a petition for the appointment of a guardian of the respondent as an insane person. A decree was entered in the Probate Court in favor of the petitioners and the respondent appealed and duly filed reasons of appeal. The case came on for hearing before a single justice of this court * and was fully heard upon such testimony, oral and otherwise, as the parties desired to submit, and a decree was entered affirming the decree of the Probate Court except that, because of a preference expressed by the respondent, Joseph D. Fallon, Esquire, was appointed guardian instead of Robert Homans, Esquire, who had been appointed in the Probate Court. The respondent appealed to the full court from the decree thus entered.

The evidence was taken by a stenographer who at a later date was appointed a commissioner as of the date of the hearing. Without passing upon the question whether a commissioner

* *Rugg*, J.

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could be so appointed, on which the presiding justice expressed some doubt, we treat the evidence, for the purposes of this case, as properly before us.

The respondent was his own attorney. He had no knowledge of the law and no experience in the practice of it except such as he had gained while a member for many years of the police force of the city of Boston. Necessarily in such a case the party so acting will be at a disadvantage, and there is always danger that some matter affecting his rights in an important particular may escape attention. We have accordingly examined the record before us and the brief of the appellant with care and we think that not only were the rights of the appellant solicitously guarded by the presiding justice, but that the case was presented with fairness and candor on the part of counsel for the petitioners.

The question whether the respondent was insane or not was a question of fact to be determined by the court upon all of the evidence before it. With the determination of such a question the appearance of the respondent would have a good deal to do. The respondent, as has been said, conducted his case in person. He was also, though against his protest, called as a witness by the petitioners and testified as such. The justice who heard the case had therefore the fullest opportunity to observe his manner and behavior, his physical condition, the way in which his mind appeared to work, the expression of his countenance, and how he spoke and acted, and apparently felt in regard to matters that came up. These and other manifestations of a similar nature would be incapable of reproduction in the printed record, but would properly have great weight with the presiding justice in regard to the finding which should be made. There was also the testimony of Dr. Dewey, an expert on insanity, that in his opinion the respondent was of unsound mind, and there was likewise evidence of acts and declarations on the part of the respondent which could be found to tend in the same direction. The rule is that in cases which have been heard as this was the finding of the single justice will not be set aside unless clearly erroneous. *Shapira* v. *D'Arcy*, 180 Mass. 377. *Reed* v. *Reed*, 114 Mass. 372. We do not see how it can be said that the finding that the respondent was insane was clearly erroneous.

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The motion for the framing of issues * was addressed to the discretion of the justice, and there is nothing to show that his discretion was wrongly exercised in overruling it.

The proceeding being of a civil and not a criminal nature, the respondent could be properly called and examined as a witness by the other party, and no constitutional right of his was thereby invaded.

Evidence of what the respondent testified to at the hearing in the Probate Court and the letter to Mr. Conant † and the folder enclosed were all admissible as bearing on the question of his sanity. It does not appear that Mr. Conant was ever employed by or acted as counsel for the respondent. We infer that the communication addressed to him was one of many similar communications addressed to different people. We understand the respondent to so testify in substance. There was nothing in the nature of a privileged communication from client to counsel.

No exception was taken to the exclusion of the hospital records during the cross-examination of Dr. Dewey by the respondent. But if an exception had been taken, the record, if otherwise admissible, was not properly proved and the court could exclude it for that reason. Moreover we do not see how its exclusion could have done the respondent any harm.

We discover no error in the manner in which the hearing was conducted.

Decree affirmed.

The case was submitted on briefs.

W. H. Cogan, pro se.

H. G. Allen, for the petitioners.

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* The motion of the respondent was that issues might be framed to be submitted to a jury. This was denied by the justice.

† H. W. Conant, Esquire, was the receiver of the property of the respondent appointed by the court. The letter was incoherent in character, and the folder enclosed in it was entitled "Police Corruption."

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PETER CAVAGNARO *vs.* LAWRENCE P. SOULE & another.

Suffolk. December 8, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Employer's Liability.

If a workman employed in the construction of a building, who for the last four or five years has worked more or less around derricks and has helped to move derricks many times when the "boss" has called him, is ordered by a superintendent of his employer to help in moving the parts of a derrick, when a boom of another derrick fifty-two feet long and ten inches by twelve, which previously has been placed by order of the superintendent leaning against the wall at an angle of forty-five degrees with its foot resting on a plank three inches thick and its other end resting against the wall, without anybody touching the boom or the plank on which it rests, suddenly slips and injures the foot of the plaintiff who is working near it, the plaintiff cannot recover from his employer for his injuries thus caused, there being nothing to show what caused the boom to slip and it being impossible to say that the mere placing of such a heavy stick of timber at an angle of forty-five degrees with one end resting on a plank and the other against the wall is evidence of negligence; and, *it seems*, that a workman of so much experience in moving derricks assumes the risk of such an accident as one of the obvious risks of his employment.

TORT by a workman for personal injuries sustained by him on May 17, 1904, while in the employ of the defendants. Writ dated November 28, 1904.

In the Superior Court the case was tried before *Richardson*, J.

The plaintiff testified that on May 17, 1904, at half past ten o'clock in the forenoon, he was working for the defendants as a laborer in the construction of a building on Boylston Street, Boston. He was working where the engineer was, helping him. "Ray, the boss, said, 'Peter, come upstairs and help me to take them sticks from there.' He called me and then he showed me with his hands and showed me where. I came upstairs and I went over there to help him on the second floor. He was there, but afterwards he went away; he went up above. He ordered six of us there. I commenced to help them take up these big pieces of wood that was there to take away; it was the foundation of the derrick. Ray, the head one, told me to go and lift on those pieces. When I got up and started in to lift on this piece of wood, the boom of another derrick was there. It was fifty-two feet long and ten inches one way and twelve the other. One end of the boom was leaning up against the wall of the building.

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The bottom of it — the foot of it — was resting upon a piece of plank of three inches thick and six inches wide." The witness illustrated the angle at which the boom stood, and the counsel agreed that the angle so illustrated was forty-five degrees. "My nearest foot to the end of the boom when it slipped was about six inches away. No one was standing nearer the end of the boom than myself. The other men were some on one side and some on the other of the stick we were lifting on. Just before I was hurt, I was standing, stooping over and touching my hands to the floor, and when I was standing there in that position, stooping over and lifting with the others on this foundation stick, the boom slipped down and came down on my foot. When I was standing there and lifting on the foundation piece of the derrick, I did not know that the boom, resting on another piece of plank that they were not touching, I did not know that the end of the boom would slip. There was nothing nearer to the plank on which the boom rested than my foot which was six inches away. No one was touching or working upon the boom itself or the plank it rested upon at the time it slipped and went upon my foot. The pieces of foundation that we were lifting on were a foot and a half from the piece of plank. I had been working there before I got hurt a quarter of an hour taking away the foundation of the derrick. During that quarter of an hour up to the time I got hurt, no part of the foundation of the derrick touched the piece of plank that the boom rested on. When we took the pieces of the foundation, we brought them over on the floor there. I believe they were to be taken up for the derrick upstairs." The plaintiff's injuries consisted of the loss of two toes and other injuries to the foot.

On cross-examination the plaintiff testified that he had been in this country ten or eleven years, during the last four or five of which he had worked more or less around derricks. He also testified "I have helped move derricks many times when the boss called me. At the time of the accident some men were working on the floor above. I didn't see anybody."

One Caine, called by the plaintiff, testified: "I was working on the building on Boylston Street for the defendants that morning before Peter got hurt. I was on the second floor. They took the derrick up, took the mast up and landed the mast on

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the top floor, and came down to get the bed pieces for it; we came down to get that. Mack Ray was there and he worked for Soule. He was boss. He had men around there working all the time and he had charge of them. He did nothing at all only walk around and look at the men and give orders. He was there every morning about seven o'clock and there all day. He did nothing except to give the men instructions how to work, where to work. He was present when the derrick was taken down on the second floor before Peter got up there. The boom was right on the floor; the socket on a three inch plank; the other end was stuck up in the building right up in the air, standing right up on the floor. It was fifty-two feet long. When the boom was placed in that way, Mr. Ray was there; four or five more laborers. When that boom was put up, Mr. Ray said, 'Put the boom back there,' and we put it there and left it there, on the three inch plank. Mr. Ray told us to put it on that piece of plank just before Peter got hurt. We were after taking it apart, taking the bolts out and the socket that sets on top of it. Peter was side of me. I was next to him, and two more on that side. We were going to lift the bed piece up to take it away, and it tipped up. The bed piece was about a foot and a half away from the boom. Peter had hold of the bed piece in his hand; we had it in our hands to carry it away, and the boom slipped back and caught him in the toes. We dropped the bed piece right where it was. At the time that end slipped, there was no one around there working on the boom. Nobody had worked on that boom, or changed its position from the time we put it up there at Mr. Ray's order until the accident happened. There was an engine down in the first floor, working — a machine on the first floor, working on the other derrick. I do not think that engine jarred the building any. It was on the first floor, and the other derrick was way the other side of the building. The floor that we were working on was all three inch plank floor; all finished up floor."

On cross-examination, the witness testified that there were a good many men working on the building at that time, carpenters on the third floor. The witness did not know whether they were working near the boom or not.

At the close of the plaintiff's evidence, the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

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D. L. Smith, (*F. Leveroni* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendants, were not called upon.

MORTON, J. There was evidence warranting a finding that the sole or principal duty of Ray was that of superintendence, and that the boom was placed by his direction leaning up against the wall as it was at the time of the accident. There was also evidence that the plaintiff was in the exercise of due care; but we see no evidence of negligence on the part of the superintendent. It was agreed that as the boom stood it was leaning against the wall at an angle of forty-five degrees, and the evidence showed that the foot of it rested upon a three inch plank. The plaintiff, by the direction of Ray, was working near the boom when the end that rested on the plank slipped and struck his foot causing the injuries complained of.

There was nothing to show what caused the boom to slip. For aught that appears the boom, when it was placed in the position in which it was at the time of the accident, was rested securely at one end upon the plank and at the other against the wall. What caused the accident is altogether a matter of conjecture. It would seem probable that in removing the pieces which constituted the foundation of the derrick, the plank on which the boom rested was in some way struck or jarred by the workmen engaged with the plaintiff in that operation so as to cause the boom to slip. It cannot be said that it was or could be found to be negligent to place a stick of timber fifty-two feet long and ten by twelve inches leaning against a wall at an angle of forty-five degrees, with one end resting on a plank and the other end resting against the wall. Notwithstanding the lateral thrust it naturally would be supposed that if the ends were securely placed the mere weight of such a piece of timber would tend to hold it firmly in position. See *Childs* v. *American Express Co.* 197 Mass. 337. *Brodie* v. *Rockport Granite Co.* 197 Mass. 147. *Thomas* v. *Boston Elevated Railroad*, 193 Mass. 438.

Moreover it would seem in view of the plaintiff's experience that the risk of such an accident as occurred was one of the obvious risks of the employment.

Exceptions overruled.

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SAMUEL COHEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 10, 1908. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence, Due care of plaintiff. *Street Railway.*

One who, upon leaving an electric street car at eleven or twelve o'clock at night, passes behind it and, as he first comes around to a position from which he can see along a parallel track in the direction in which the car which he has left was going, sees a car approaching thereon a good distance away, but which approaches so rapidly that, when he has passed over the few feet which separate the two tracks and has stepped on to the track in front of the approaching car, it is only about two car lengths away, and who then proceeds diagonally across the track in front of the car with his back partially turned toward it and without looking again because he does not think there is any danger, is not in the exercise of due care.

TORT, for injuries received by the plaintiff due to his being run into by an electric car of the defendant as he was crossing the street railway track in front of it, having come from behind a car going in the opposite direction, from which he had just alighted. Writ in the Superior Court for the county of Suffolk dated March 10, 1906.

The case was tried before *Stevens*, J., who, at the close of the evidence, ordered a verdict for the defendant; and the plaintiff alleged exceptions. The facts are stated in the opinion.

D. L. Smith, for the plaintiff.

W. H. Foster, (*H. S. MacPherson* with him,) for the defendant.

MORTON, J. The facts in this case lie within a narrow compass. The evidence comes almost wholly from the plaintiff. The other evidence was to the effect that there was no slackening of the speed as the car approached the place of the accident, that the motorman did not ring the bell or apply the brakes, and that the car was going at a minimum rate of eighteen to twenty miles an hour. The accident occurred between eleven and twelve o'clock at night on January 27, 1906. There was no snow on the ground. The plaintiff had been working during the day and evening, and was on his way to his home on Alaska Street in Roxbury where he had lived for two years.

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He alighted from his car at the place where he usually alighted and with the surroundings of which he was entirely familiar. As to what he did after alighting, the plaintiff testified in substance that he went round the rear of the car to go across the street and as he got clear of the car he looked up and saw the light of the approaching car; that he couldn't say how far away it was, — "it was a good distance," — and he continued crossing to get to the other side; and that, as he was about to step on to the inward bound track, he looked up again and saw the car much nearer than it was before, about sixty or seventy feet away. In answer to a question by the presiding judge he said that the second time that he looked was just after he got on to the inward bound track, and that he quickened his pace a little so as to get across; that he was walking with his back a little bit towards the car so as to get on the crossing and was almost over when the car came along and struck him and broke his leg. On cross-examination he testified that he knew and appreciated the danger that there was of cars coming down on the other side of the car from that on which he got off, and that that was the reason that he looked; that he saw the car coming down and thought that it was at a perfectly safe distance for him to continue, and he walked on with his back partially turned towards the car and when he got to the rail looked again and the car was about sixty or seventy feet away and he continued with his back partially turned towards the car until he was struck. In answer to questions put to him by the presiding judge during the cross-examination, he said that just as he stepped on the track he turned and looked and saw the car sixty or seventy feet away and attempted to cross and did not look after that; and that he "didn't think there was any danger."

We think that the plaintiff was not in the exercise of due care. To step on to a track at eleven or twelve o'clock at night in front of a rapidly approaching car which was a good distance away when he first saw it as he went round the rear of the car that he got off of and which had approached so rapidly that when he had passed over the few feet which separated the two tracks and had stepped on to the inward bound track it was only about sixty or seventy feet away, a little more than two car lengths as was said on the cross-examination, and then to pro-

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ceed diagonally across the track with his back partially turned towards the approaching car without looking again because he did not think there was any danger was an act of carelessness and not simply an error of judgment. He saw the car and knew that it was approaching rapidly and the fact that the gong was not sounded could not, therefore, have affected his conduct. It is true that he could properly trust somewhat to the expectation that the motorman would exercise reasonable care, but the time was near midnight and the motorman could not be expected to see him, and he was bound to take proper precautions himself for his own safety. *Tognazzi* v. *Milford & Uxbridge Street Railway*, 201 Mass. 7. We think that the case is governed by *Callaghan* v. *Boston Elevated Railway*, 200 Mass. 450; *Casey* v. *Boston Elevated Railway*, 197 Mass. 440; *Madden* v. *Boston Elevated Railway*, 194 Mass. 491; *Holian* v. *Boston Elevated Railway*, 194 Mass. 74; *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242; *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562; *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8, and *Mathes* v. *Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416.

Exceptions overruled.

CATHERINE HURLEY, administratrix, *vs.* CITY OF BOSTON.

Suffolk. January 13, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Way, Defect in highway. *Negligence.*

The fact that changes in a public street of a city are being made under authority of a statute providing for the abolition of a grade crossing does not relieve the city from its statutory liability for an injury to a traveller caused by a defect in the street, if no order has been made by the proper authorities of the city formally closing the street to public travel.

At the trial of an action of tort against a city under Pub. Sts. c. 52, §§ 17, 18, to recover for bodily injury to and the death of the plaintiff's intestate caused by his walking at night off an abutment which the plaintiff alleged that the defendant had made in a public street in raising its grade and had not properly guarded, it appeared that the changes in the surface were being made under the provisions of a statute abolishing a grade crossing of a railroad with a public street, that the street where the abutment was had not been formally closed to travel by any vote of the authorities having the right to close it, that no lights

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or barriers had been placed on or near the abutment, that the street was one of several which proceeded from a public square about four hundred and fifty feet from the abutment, and that about two hundred and twenty-five feet from the abutment it was crossed at right angles by another street. Certain witnesses for the defendant stated that at the public square there were barriers, with lights and notices prohibiting travel on the street, placed across the street in question, but with spaces at the ends of the barriers large enough for persons to pass freely around the barriers, (one witness stating that there was a space of seven or eight feet at one end,) and that there were like barriers and lights across the intersecting street and on each side of but not in the street in question. There was other evidence tending to show that the public square was one much used, that many people lived and had business on the street in question and went back and forth around the ends of the barriers at the square, a beaten muddy path having been worn there by them, there being no sidewalk. The presiding judge, having left to the jury the special question whether the city maintained the barriers and lights described by the defendant's witnesses and the jury having answered affirmatively, ruled that there was no evidence of negligence on the part of the defendant. *Held*, that the ruling was wrong, since the special finding related only to the existence of the barriers and lights and the question, whether they were suitable and sufficient, still remained to be passed upon by the jury.

A traveller on a city street in many cases may be justified in thinking that a notice that the way is closed to public travel, placed upon a barrier in the street, is no broader in its scope than the barrier to which it is attached and that the thing closed to public travel is only that part of the street which is shut off by the barrier.

At the trial of an action of tort under Pub. Sts. c. 52, §§ 17, 18, against a city to recover for bodily injury to and the death of the plaintiff's intestate, a woman about sixty years of age, caused by her walking on a dark night off an abutment thirty feet high in a public street made by the defendant in the course of raising the grade of the street, there was evidence tending to show that the abutment was about four hundred and fifty feet distant from a public square, that there was no obstruction in the street between the square and the abutment, that there were barriers in the street at the square, but with ample room at both ends for persons on foot to pass them and a muddy path worn there where persons had done so, that the plaintiff's intestate lived on a street near the street in question and had not been on the latter street since work had been begun thereon by the city, that on the night of the accident she entered the street by passing the barriers at the square and walked straight ahead, thinking that her path was clear until, without warning, she fell. *Held*, that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury.

TORT under Pub. Sts. c. 52, §§ 17, 18, to recover for the bodily injury and subsequent death of Ann Fuller, the plaintiff's intestate, alleged to have been caused by her falling over an embankment, which was negligently left unguarded by the defendant in the progress of raising the grade of Swett Street in South Boston. Writ in the Superior Court for the county of Suffolk dated December 6, 1900.

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The case was tried before *Bond*, J. The facts and the course of the trial are stated in the opinion. The presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. F. White, for the plaintiff.

A. L. Spring, for the defendant.

HAMMOND, J. This is an action under Pub. Sts. c. 52, §§ 17, 18, to recover for personal injuries to the plaintiff's intestate, and is before us upon exceptions to the order of the judge presiding at the trial directing a verdict for the defendant.

Although the changes in the surface of Swett Street were being made under St. 1897, c. 519, still, inasmuch as no order appears to have been made by the proper authorities of the defendant city formally closing the street to public travel, the statutory liability of the defendant to protect the public travel still remained. *Torphy* v. *Fall River*, 188 Mass. 310. The only questions practically in dispute were whether the plaintiff was careful and the defendant negligent.

1. As to the negligence of the defendant: At the close of the evidence the trial judge, having refused to order a verdict for the defendant, submitted to the jury the following question: "At the time of the injury to the plaintiff's intestate, did the city maintain at the entrance of Swett Street, at Andrew Square, horses and lanterns, with the notice substantially as testified to by the witness Feeley, so that they could be plainly seen by light from the street lights from the locality in Andrew Square, by persons passing there on Swett Street, and did the city at the time of the accident maintain at the entrance to Ellery Street horses and lights, as testified to by the witnesses?"

The jury answered this question in the affirmative, whereupon the presiding judge ordered a verdict for the defendant. It will be observed that the question submitted to the jury was not whether the barriers and lights were suitable and sufficient, but only whether they existed. The subsequent order directing a verdict was therefore in substance a ruling that as matter of law the barriers and lights found by the jury to have existed were legally sufficient to relieve the defendant, or, in other words, that there was no negligence on the part of the defendant. The verdict of the jury simply established that the barriers and

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lights existed at Andrew Square as described by Feeley, and at Ellery Street as described by him and the other witnesses.

It appeared that there "were no railings, guards, barriers, lights or other thing or contrivance, either upon said abutment itself [from which the plaintiff fell] or near said abutment, to warn persons of its presence or the fact that there was any hole or other dangerous condition beyond it." There was evidence that Andrew Square was about four hundred and fifty feet easterly from the abutment, and that Ellery Street crossed Swett Street substantially at a right angle, about two hundred and twenty-five feet from Andrew Square, or about half way between the square and the abutment.

The witness Feeley, a police officer, testified as to the barriers and lights as follows: "That on the night of the accident and on previous nights there were no lights or railings on the abutment, and that the nearest lights thereto were two lights on wooden horses, one a white light on a horse placed to the north of Swett Street across the line of Ellery Street, the other a red light on a horse placed to the south of Swett Street in the line of Ellery Street; these horses covered the whole of Ellery Street; that on the night of the accident about all the earth was in and Swett Street was practically graded up to the abutment; that Geer's factory was very near the abutment." And on cross-examination he testified as follows: "That about ten feet from Andrew Square to the west on Swett Street there were three horses, with two red lanterns on each, each horse measuring from twelve to fifteen feet, and that behind the horses were some dirt and some large stones such as are used for curbstones, he should say one curbstone on either side; that the dirt was that used in grading and went along up the slope; that the street was not paved; that there was a sign about four feet by three on the centre horse, which read in substance, 'Street closed to travel while grading. Persons crossing or using the street do so at their own risk'; that the sign was white and the letters black, its lower edge being about three and one half feet from the ground; that at Andrew Square there are five streets intersecting, a very busy place night and day, with one electric light on the northerly corner of the Square and Dorchester Avenue, and another at the intersection of Boston Street and

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Dorchester Avenue; that they were the ordinary arc lights on the large thirty foot poles; the witness had no trouble in seeing this sign and what was printed upon it, at night; nothing obstructed the view of a person coming from Dorchester Street crossing the Square and intending to go to Swett Street, of the horses, lights and sign except the ordinary street travel. Witness stated that no one could get to [the] abutment by any street, except they passed the three horses with lights and sign at Andrew Square and Swett Street, or the horses across Ellery Street near the intersection of Ellery Street and Swett Streets." He further testified that there was space enough for people to go between the building called Farrell's saloon on the north side of Swett Street and the north end of the horse nearest that side; that a similar situation existed on the south side of Swett Street; that on either side there was room enough to go around the end of the horses. The testimony of the other witnesses did not vary from this, except that one witness stated that the distance between the horse and Farrell's store was about seven or eight feet. The presiding judge ruled as matter of law that these barriers and lights with the notice were sufficient, and having so ruled ordered, as above stated, a verdict for the defendant.

There was evidence that there were houses and other buildings on the north side of Swett Street, reaching from Andrew Square westerly to Ellery Street, and also some buildings on the south side of Swett Street between the Square and Ellery Street; that although there was no regularly constructed sidewalk, yet "there was a lot of stuff beaten down there," muddy and not so hard as an ordinary sidewalk. There was evidence that many people passed upon the north side of the street to and from the buildings on that side, including a factory employing ten or fifteen hands. There was evidence that during the month in which the accident occurred, "after six o'clock people went up Swett Street from Andrew Square on the north side, crossed over, and at a point on the southerly side about eighteen feet from the abutment went down the embankment for a short cut, crossed the railroad location at grade, and that people coming from the west side of the abutment came up this embankment on to Swett Street to get to Andrew Square."

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The street was not formally closed to public travel by any vote of the authorities having the right to close it. The obstruction to the travel was a very dangerous one. Against the liability to a plunge down this embankment it was the duty of the defendant to use due care to protect the public travel. It placed no barriers or lights or anything whatever at or near the embankment. About two hundred and twenty-five feet easterly of the embankment there were lights and barriers on each side of Swett Street, shutting off Ellery Street. But these barriers were not across Swett Street, and they were no obstacle to the progress of the traveller. To a person not familiar with the surroundings they may have indicated to the traveller, not that there was trouble with Swett Street, but rather with Ellery Street.

Apparently the only things relied upon to keep the traveller from the embankment were the wooden horses, lights and notice at or near Andrew Square. These horses did not stretch entirely across the street. Upon each side there was a part of the street, that upon the north side being described by one witness as about seven or eight feet wide, which was not blocked by the horses. What such a barrier may be fairly understood to mean depends upon circumstances. In the case of a country road where only a narrow strip is worked for public travel either for pedestrians or for carriages, a barrier erected across the whole of that strip might well be regarded as sufficient, especially if accompanied by a notice that the street is closed to public travel. Such a barrier is an obstruction to every one who seeks to travel in any part of the road set apart for public travel. But the case may be different in a city where the whole of the road is worked for public travel. In the case of such a street a barrier erected across the part used for carriages but not across the sidewalk or part ordinarily used by pedestrians, may be interpreted by the traveller as being intended to stop the progress of carriages, but not of pedestrians upon the sidewalk; and many times that interpretation will be correct. And even if there be a notice that the street be closed to travel while grading, the question is not absolutely concluded against the traveller. In many cases he may be justified in thinking that the notice is no broader in its scope than the barrier, and that the thing closed to public

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travel is only that part of the street which is shut off by the barrier.

In view of the great amount of public travel in the vicinity of Andrew Square, the fact that a portion of the street was not physically closed against the steps of the traveller, the dangerous character of the defect and the other circumstances of the case, we are of opinion that the question whether proper care was taken by the defendant to see that the path of the traveller was safe, was for the jury. The case must stand with a class of cases of which *White* v. *Boston*, 122 Mass. 491, and *Jones* v. *Collins*, 188 Mass. 53, are types.

2. As to the due care of Ann Fuller, the plaintiff's intestate: There was evidence that she was about sixty years of age, unable to read and write, but a "smart, bright appearing woman for her age"; that she lived on Dorchester Street, near Swett Street, and that she had not been on Swett Street since the repairs began. The jury might have found upon the evidence that she entered Swett Street at Andrew Square and must have passed by the barriers. The exact course she took was not clear, but after she passed these barriers there were no obstacles to her progress until she reached the embankment from which she fell to the railroad bed thirty feet below. The night was dark. A few hours after the accident, in reply to a question from her daughter as to how the accident happened, she said, "I don't know, dear; I thought I was going right straight along, and I thought everything was all right until in one moment I was down and that was the last of me, I was over." A jury may conclude that this language has in it the ring of sincerity, and that this woman supposed her path was clear, and further that she was justified in so thinking. Under all the circumstances the question of her due care was for the jury. *White* v. *Boston*, 122 Mass. 491.

Exceptions sustained.

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JAMES H. DEVLIN, JR., administrator with the will annexed, *vs.* MARY HOUGHTON.

Suffolk. January 19, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Implied in law. *Fraud. Undue Influence. Conversion.*

At the trial of an action by an administrator for money had and received by the defendant from the deceased person, the plaintiff introduced in evidence interrogatories which he had propounded to the defendant under R. L. c. 173, § 57, and the defendant's answers thereto, from which it appeared that the defendant had received from the deceased person both money and orders upon banks for money which he cashed during the lifetime of the deceased person, but the defendant did not state in his answers why or under what circumstances he received them. Without there being any evidence that the deceased person intended the money to be either a gift to the defendant or a payment to him in satisfaction of a debt, the defendant rested at the close of the plaintiff's evidence, and the presiding judge ordered a verdict for him. *Held*, that the verdict should not have been ordered, since there was evidence from which the jury might have found that the money was received by the defendant to the use of the deceased person.

The evidence at a trial tended to show that M., an unmarried woman, had lived with her brother until his death in June, 1902, in a three tenement house which she owned in the north end in Boston, that at that time she was seventy-one years of age and after that time until July, 1904, had lived alone, being bedridden with cancer of the breast after March, 1903, that she did not care for her relatives and that they had nothing to do with her, that in April, 1903, she made a will giving all her property to a certain church; that one H., a woman, constantly urged, "had her tormented to death," to sell her house, that much against her will she sold her house in July, 1904, the transaction being carried through in H.'s absence by H.'s son in law and a person who might have been found to have been acting as H.'s attorney both at that time and in subsequent litigation regarding the matter, that M. felt very badly at leaving the house and was moved to H.'s house by H.'s husband in an unkind manner two weeks after the sale, that at H.'s house M. grew rapidly worse; that on September 7, 1904, H. procured from M. orders for $8,300 which M. had in certain banks and procured the money; that on September 29 H. took persons who were calling upon M. aside and inquired of them what M. was going to do with her money, and on being told the disposition provided for in the will, stated "I do not think that is right. . . . If that is the case, let her get a trained nurse," that on October 8, M., calling for her pocket book in H.'s presence, kept possession of it, that M. died on October 10, 1904, from exhaustion produced by cancer of the breast from which she had been suffering for four years, that repeatedly after she went to H.'s house she had emphatically stated that her property was to "go to the church," but signified that she did not wish to talk of the matter in H.'s presence, that, after the death of M., H. stated that she had given her a

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present of $1,000. *Held*, that there was evidence from which a jury would have been warranted in finding that H. wrongfully obtained money of M. in her lifetime, for which M.'s administrator had a right of action after M.'s death.

TORT by the administrator with the will annexed of Ellen McLaughlin for the conversion of $9,000 "or thereabouts" which, it was alleged in the declaration, the defendant "wrongfully, tortiously and by means of the exercise of undue influence obtained from the plaintiff's testatrix . . . and converted to her own use." Writ in the Superior Court for the county of Suffolk dated May 4, 1905.

The case was tried before *Bond*, J. The interrogatories and the answers to them, referred to in the opinion, were as follows:

"Q. What sum of money did you receive from the plaintiff's testatrix on or about the 7th day of September, A. D. 1904? A. About $8,300.

"Q. What order or orders and on what savings bank or other banking institution for the payment to you of money deposited in the name of the plaintiff's testatrix or of any person for her did you receive on or about the 7th day of September A. D. 1904? A. I received the following orders: — One on the Suffolk Savings Bank, and one on the Provident Institution for Savings, and two checks on the United States Trust Company.

"Q. State the specific amounts of money you collected on said orders and name the institution from which you received the same. A. I received about $6,800 from the United States Trust Company, about $400 from the Provident Institution for Savings and about $1,100 from the Suffolk Savings Bank.

"Q. State what transfers if any were made of accounts in banking institutions from the name of the plaintiff's testatrix to your name or that of any person for you or designated by you? A. There were no transfers made in any banking institution from the name of the plaintiff's testatrix to my name or that of any person designated by me.

"Q. State the sum total of money which you received from the plaintiff's testatrix? A. As stated in one answer."

Other facts are stated in the opinion. At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

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E. V. Grabill, (*J. J. Corbett* with him,) for the plaintiff.

G. R. Swasey, (*J. F. Sullivan & W. P. Thompson* with him,) for the defendant.

LORING, J. This was an action of tort in which the plaintiff declared for the conversion of "nine thousand dollars or thereabouts." The defendant rested on the plaintiff's evidence and asked the judge to direct the jury to return a verdict in her favor. "During the course of the arguments objection was made by the defendant to the form of the action. Thereupon the plaintiff's counsel stated his willingness to amend. The court ruled that the plaintiff could not recover and directed a verdict for the defendant. The ruling was made without regard to the form of the declaration." The case comes before us on an exception to this ruling.

The learned counsel for the defendant conceded at the argument that the ruling made was a ruling that the defendant was not liable to the plaintiff in an action at law. The case therefore may be taken to stand where it would stand were the writ a writ in tort or contract and a count for money had and received were inserted in the declaration.

It was contended in support of the ruling made by the presiding judge that the plaintiff must make out a case of fraud or undue influence, for the law will assume at the outset that the defendant has the $8,300 rightfully.

Doubtless the law puts on the plaintiff the burden of proving that the $8,300 was the money of the testatrix. But when that was proved, a case of money had and received was made out without proof of fraud or undue influence. The plaintiff proved that the $8,300 was the money of the testatrix when he proved that the defendant received it from her. That he proved by her answers to the interrogatories filed by him.

All that the plaintiff asked the defendant in the interrogatories filed by him was: "What sum of money" she received from the testatrix on or about September 7, 1904. The defendant answered: "About $8,300." In answer to further interrogatories the defendant stated that on September 7 she received an order on the Suffolk Savings Bank, an order on the Provident Institution for Savings, and two checks on the United States Trust Company; and received about $6,800 from the United

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States Trust Company, about $400 from the Provident Institution for Savings, about $1,100 from the Suffolk Savings Bank.

It is to be noted that although the defendant had the right under R. L. c. 173, § 60, to introduce into her answer any matter relevant to the issue to which the interrogatory answered related, she did not state how she came to "receive" the $8,300 which she did "receive." She did not state that it was received for value rendered to the testatrix, or that it was a gift from the testatrix to her.

This made out a case of money had and received by the defendant to the plaintiff's use. On these answers the jury were warranted in finding that the $8,300 which the defendant obtained from the Institution for Savings and the trust company were handed by her to the testatrix and then handed by the testatrix to the defendant. But a case of money had and received was made out even if that is not so. Where property belonging to the plaintiff has been reduced to money after it was received by the defendant but before the action is brought, money had and received lies. *McCabe* v. *Maguire*, 182 Mass. 255. *Hagar* v. *Norton*, 188 Mass. 47.

The case must go back for a new trial, and for that reason we think it proper to consider the question which has been fully argued, namely, whether the jury were warranted in finding that the defendant wrongfully obtained the $8,300, or the orders and checks by which she obtained the $8,300.

It appeared that the testatrix, being then seventy-three years of age, died on October 10, 1904, from exhaustion produced by cancer of the breast from which she had been suffering for four years.

The testatrix was a spinster and had been a cook in early life. For many years before July, 1904, (the July next preceding the October in which she died,) she had lived at 11 Cooper Street in the north end of Boston. Until June, 1902, her brother had lived with her. Her brother died at that time, and since then, until July, 1904, when the house was sold, she had lived alone. The house No. 11 Cooper Street contained three tenements. The testatrix lived in the lower tenement and let the two upper ones.

Her nearest relatives were two grand nephews and a grand

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niece. The jury would have been justified in finding that she did not care for them and that they had nothing to do with her. In March, 1903, she became bedridden. From March, 1903, to June of that year she was taken care of by Grace Sullivan; from June, 1903, to the middle of November, by Josephine Gilman; and from November, 1903, to July, 1904, by Densy Gaddis, all of whom testified for the plaintiff.

In April, 1903, she made a will leaving all her property to the pastor of St. Mary's Church, for masses for the repose of her soul and of those of the deceased members of her family. St. Mary's Church was the parish church for the district in which she lived, and the church where she had been in the habit of worshipping. The jury would have been warranted in finding that the testatrix always had intended that her property should go to the church, and that she continued to be of that mind until she died.

For some time before July, 1904, the defendant, who seems to have been a friend of the testatrix, had been urging her to sell her house 11 Cooper Street. Grace Sullivan testified: "The defendant Mrs. Houghton called there once or twice a week while I was there. Mrs. Gilman — Josephine Houghton at that time — succeeded me in caring for Miss McLaughlin. While she was there my mother and I called two or three times a week and would run up on Saturdays. Mrs. Gilman was followed in the care of Miss McLaughlin by Mrs. Gaddis, and while she was there mother and I called as before. At the time Miss McLaughlin said she did not want to sell her house, that she wanted to stay there as long as she lived, that Mrs. Houghton, the defendant, was down there and asking her if she was going to sell her house and telling her she knew of different ones who were willing to buy it if she wanted to sell it, that Mrs. Houghton had her tormented to death to sell her house. Miss McLaughlin said this to me at different times when I called there before the house was sold. The house was sold in July, 1904." The same witness testified that one Budrow, the defendant's son in law, and one Sullivan, came in while she was calling on the testatrix in July, 1904. The defendant's answer in this case is signed by one Sullivan. When Budrow and Sullivan came in, Budrow "told her [the testatrix] that

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he had sold the house and got the deed for the sale of the house and wanted her signature; and Mr. Budrow said he had carried out her affairs just the same 'as if Mamma Houghton was there and we have put the money in the bank and I brought $300 down here; I guess that will be money enough for you to have in the house to pay any little bills there may be.'" The testatrix then signed the deed and the son in law and Sullivan left. Whereupon the testatrix said: "He is very smart, but when I get a little better I will fix my affairs to suit myself." The purchaser then notified the testatrix to leave in two weeks.

The witness's testimony then continued as follows: "Before leaving the house Miss McLaughlin sat on a chair and cried and said she did not want to leave the house. Mr. Houghton, the defendant's husband, said to my mother 'Hurry up, Laura, get her up to the house and I will pay you well for it.' My mother said 'What do you mean? I'm not here for pay.' He then walked away and did not say anything more."

On the 29th of September (twenty-two days after Mrs. Houghton received the $8,300), the same witness with her mother called on the testatrix at Mrs. Houghton's. This witness testified as follows: "While we were calling there, my mother asked Miss McLaughlin if she had changed her will and she said, 'No, no, no; Why should I? The money that I have worked hard for is going to St. Mary's Church.' Just then Mrs. Houghton came through the hall and Miss McLaughlin put her fingers on her mouth and shook her head — told her not to say any more. I was present half an hour later on that day when Mrs. Houghton had a conversation with my mother. As we were in the hall leaving the house, she asked mother to step in to the parlor and said, 'Mrs. Sullivan, what do you think Ellen is going to do with her money?' Mother said 'She has made a will and left her money to St. Mary's Church.' 'Well,' Mrs. Houghton said, 'I don't think that is right. Do you?' Mother said, 'I think she has a right to leave the money she has worked hard for wherever she wants to,' and then Mrs. Houghton said, 'If that is the case, let her get a trained nurse.'"

The mother of the last witness called on the testatrix two days before she died. Her testimony as to this visit was as follows: "I called and asked Mrs. Houghton if I could see

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Miss McLaughlin, she said she was dosing, but I said I would like to see her because I was in a hurry. So she brought me into the room and I stood down at the foot of the bed. Miss McLaughlin asked for her pocketbook. Mrs. Houghton's sister, Bridget Houghton, was standing there. (This is not the Bridget Houghton whose testimony is later set forth in the bill of exceptions.) Mrs. Houghton said 'Do you know what she is saying?' I said 'Yes, ma'am.' She said 'Why! she says to put the woman in black out of the room.' All three of us were dressed in black and I asked which one did she say. As a matter of fact, Miss McLaughlin did not say what Mrs. Houghton said she said, but asked for her pocketbook. Bridget Houghton (not the witness whose testimony is later set forth) handed it to her, and she put her hand on it right like that (illustrating)."

After the death of the testatrix but before the funeral, one Bridget Houghton (apparently no relation of the defendant) called, seemingly to see the body. She testified: "Mrs. Houghton asked me how I thought she looked, and said Ellen McLaughlin made her a present of $1,000 and that she was a great care. I said she was deserving of it."

We are of opinion that this evidence warranted a finding that the defendant conceived the idea of possessing herself of the property of the testatrix; that the defendant tormented the testatrix to sell her house when she did not wish to, because she (the defendant) could not secure for herself the house as easily as she could the purchase money for it. Her husband was not taking the testatrix to the defendant's house, and the defendant was not taking care of the testatrix out of kindness. The occurrences of September 28 and October 8 showed that the testatrix was afraid of the defendant; and in addition the defendant's actions and remarks on September 29 require explanation at least, if she did not have some ulterior motive in what she had done in the house and in the care she was taking of the testatrix. Lastly, the defendant made a statement about the matter which was not true; for, whatever may be found to be the fact, it is certain that the testatrix did not make a present of $1,000 to the defendant.

If the defendant did obtain for herself these goods in this way, a conversion during the lifetime of the testatrix was made

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out, and that right of action passed on her death to the plaintiff as administrator with the will annexed. *Hagar* v. *Norton*, 188 Mass. 47.

Exceptions sustained.

GEORGE H. SIMONEAU *vs.* RICE AND HUTCHINS.

Middlesex. January 19, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Of one owning or controlling real estate, Elevator, In factory, Employer's liability. *Evidence*, Remoteness, Relevancy.

At the trial of an action against the proprietor of a shoe factory, by a young man nineteen years of age, who, while employed therein, fell down a freight elevator well, the declaration in three counts alleging negligence of the defendant in failing to protect and safeguard the elevator well as required by R. L. c. 104, § 43, failure to warn the plaintiff of the state of affairs, and, under R. L. c. 106, § 71, cl. 1, a defect in the ways, works or machinery of the factory, it appeared that the plaintiff in the course of his duties was pulling shoe racks from one room to another when the heel of his shoe came off, that he stepped to the opening of the freight elevator well and to fix his heel raised his foot and placed his right hand for support upon a bar which was across the opening, that the bar was six feet long, four inches wide and one inch thick and rested at each end upon an iron cleat or half square, that it could be moved lengthwise through the cleats, that, as the plaintiff's hand was resting on the bar, the bar slipped lengthwise out of its support and he fell into the well; it also appeared that the plaintiff had been employed by the defendant for eight days and had had abundant opportunity to observe the condition of the opening. The presiding judge ordered a verdict for the defendant, and the plaintiff alleged exceptions. *Held*, that the exceptions must be overruled, since the plaintiff must be held to have assumed the risk of the displacement of the bar in the manner described.

If, at the time when one enters into the employ of the proprietor of a factory, the opening into an elevator well therein is insufficient to satisfy the requirements of R. L. c. 104, § 43, but such insufficiency is so apparent that the employee either knows or ought to observe it, and, because of such insufficiency he is injured, he cannot recover from his employer, since he must be held to have assumed the risk of the injury which he received.

At the trial of an action by an employee in a factory against his employer, to recover for injuries alleged to have resulted from the plaintiff's falling down an elevator well because of an insufficient or defective guard in front of the well, if it appears that, at the time of the accident, the means of guarding the well were the same as they were when the plaintiff entered the defendant's employ eight days before, evidence as to the condition of the opening into the elevator before the plaintiff entered the defendant's employ properly may be excluded.

TORT for personal injuries received by the plaintiff while in the employ of the defendant, with a declaration in three counts,

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the first count alleging, as the cause of the injuries, that the defendant negligently failed to protect the opening into the elevator well "by sufficient automatic rails or gates and trap doors or such other mechanical devises as are equivalent thereto" or to "keep the same in repair," the second count adding as a cause of the injury, that the defendant failed to warn the plaintiff of the danger of working near the elevator in the condition in which it was, and the third count setting forth a cause of action under R. L. c. 106, § 71, cl. 1. Writ in the Superior Court for the county of Middlesex dated June 15, 1907.

The case was tried before *Sherman*, J. The facts are stated in the opinion. At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant and reported the case for determination by this court, with the stipulation that if on the evidence admitted there was an issue for the jury, a verdict of $500 should be entered for the plaintiff, or if there was any error in admitting or excluding evidence, a new trial was to be granted; otherwise, judgment was to be entered for the defendant.

J. J. Shaughnessy, (*F. P. O'Donnell* with him,) for the plaintiff.

R. Spring, (*W. Rand* with him,) for the defendant.

HAMMOND, J. While the plaintiff, a young man then nineteen years of age, was moving some shoe racks upon a floor in the factory of the defendant, the heel of one of his shoes was torn off. Apparently for the purpose of examining the shoe, he seems to have left the racks, walked about three feet toward an elevator well, and upon reaching it raised his foot, at the same time placing his right hand for support upon the bar which was across the entrance to the elevator; the bar slipped lengthwise out of its support, and he fell into the well and was injured. In this large room, one hundred feet in length, the place he selected against which to lean was the only one where there could have been any danger; and even here there would have been no danger had not his hand so touched the bar as to shove it lengthwise.

Whether the plaintiff was in the exercise of due care is a question of considerable difficulty, but we have not had occasion to pass upon it, for, even if that question should be decided in his favor, there is still a fatal defect in his case. The bar which

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was placed across the entrance to the elevator and which the plaintiff displaced by his hand was made of wood and appears to have been about six feet long, four inches wide and one inch thick. It rested at each end upon "an iron cleat or half square." It could be moved lengthwise through the cleats. It was a very simple contrivance and could be easily understood by any boy of average intelligence. It was the contrivance in use at the time the plaintiff entered the employ of the defendant and continued constantly in use up to the time of the accident. The defendant owed to the plaintiff no duty to change the condition of its factory for his accommodation. In entering the defendant's employ he assumed the obvious risks incident to the business. And this means not necessarily the risks which he actually knew about but also what by proper care he might know. As stated by Morton, J., in *Kenney* v. *Hingham Cordage Co.* 168 Mass. 278, 282: "The question in each case is not whether the employee has actually observed and by a conscious act of the will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employee assumes them." Under the circumstances of the present case the plaintiff must be held to have assumed the risk of the displacement of this rail in the manner described.

Nor upon this branch of the case would it be material that this condition of things is not such as is required by R. L. c. 104, § 43.

No error was made in the exclusion of the evidence as to the prior condition of the opening into the elevator before the plaintiff entered the employ of the defendant.

Judgment for the defendant.

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JOHN Q. A. COOK & others, executors, *vs.* SUPREME CONCLAVE IMPROVED ORDER HEPTASOPHS.

Suffolk. January 21, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Fraternal beneficiary. *Fraternal Beneficiary Corporation. Trust*, Resulting.

Where a member of a fraternal beneficiary corporation in 1899 receives from the corporation a benefit certificate in which his wife is named as beneficiary, and, after his wife has died, he dies without leaving an heir or next of kin or person dependent upon him and without having designated any person as beneficiary under the certificate in place of his wife, if the constitution and by-laws of the corporation contain no provision as to what person shall receive the death benefit under such circumstances nor as to the benefit's reverting to the corporation, the executor of the will of such deceased member cannot recover from the corporation the benefit in an action at law, either on the ground that under the circumstances a trust results in favor of the executor, or otherwise.

CONTRACT upon a certificate of fraternal benefit insurance. Writ in the Superior Court for the county of Suffolk dated April 23, 1908.

The material portions of the amended declaration were as follows:

"The plaintiffs say that Ephraim Provo . . . died on April 28, 1907, testate; . . . that the plaintiffs were duly appointed executors of [his] will; . . . that on February 21, 1899, . . . the defendant issued and delivered to said Ephraim Provo upon his request and application a benefit certificate or policy of insurance for the amount of $2,000, whereby the defendant promised and bound itself to pay out of its benefit fund to Ira V. Provo, the wife of said Ephraim Provo, the sum of $2,000 within sixty days from the receipt of satisfactory proof of the death of said Ephraim Provo, provided that said Ephraim Provo should be in good standing in said order at the time of his death and provided also that said certificate should not have been surrendered by said Ephraim Provo and another certificate issued at his request in accordance with the laws of said order; . . . that said Ira V. Provo died prior to the death of said Ephraim Provo; that at the time of said Ephraim Provo's death he was in good

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standing in said order; that satisfactory evidence of the death of said Ephraim Provo was duly furnished to the defendant; that said Ephraim Provo had not surrendered said certificate; that said defendant had not at his request issued any other certificate; and that said Ephraim Provo had not designated any other beneficiary thereof; that at the time of his death said Ephraim Provo had no heirs at law or next of kin, or persons dependent upon him; that from the time the defendant issued said certificate until the death of said Ephraim Provo he had paid all of the fees, assessments, and dues of every kind which under the constitution and laws of the defendant order he was obliged to pay; that the constitution and laws of the defendant contain no provision as to whom the amount of the benefit certificate shall be paid under the conditions herein alleged, nor for the reversion of the same to the defendant. Because of the facts heretofore alleged the amount of said certificate, to wit, $2,000, resulted to the benefit of the estate of said Ephraim Provo and became due and payable to the plaintiffs as executors of his will, and the plaintiffs have demanded payment thereof from the defendant, and the defendant has neglected and refused to pay the same. Wherefore the defendant owes the plaintiff the amount of said certificate, to wit, $2,000."

The defendant demurred to the declaration. The demurrer was sustained by *Wait*, J., and the case was reported to this court for determination of the correctness of the ruling sustaining the demurrer.

A. W. Putnam, (*H. E. Jackson* with him,) for the plaintiff.

H. L. Brown, *E. Field* & *W. F. Murray*, for the defendant, were not called upon.

HAMMOND, J. This is an action upon a death benefit certificate issued by the defendant, a fraternal beneficiary corporation, to one Ephraim Provo, a member of the order, in which certificate the only beneficiary named was his wife. She died before him, and he did not designate any other beneficiary. The defendant filed a demurrer which was sustained in the Superior Court, and the case is before us upon a report: "such order to be made as justice requires."

The law in force at the time the certificate was issued, so far as respected the death fund, was St. 1888, c. 429, §§ 8, 9. It is

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alleged in the declaration that at the time of Provo's death he had no heir at law or next of kin, or person dependent upon him; and further, that "the constitution and laws of the defendant contain no provision as to whom the amount of the benefit certificate shall be paid under the conditions herein alleged, nor for the reversion of the same to the defendant." And there is no allegation that there is in existence any person or corporation coming within the class of parties named as possible legal beneficiaries under the statute to whom the plaintiffs would be accountable as trustees. We have then a case where the beneficiary named in the certificate has died before the member, who has failed to name any other beneficiary, and where there is no express provision in the laws of the society as to what shall be done with the trust fund. The case therefore is plainly distinguishable from cases like *Daniels* v. *Pratt*, 143 Mass. 216, where the by-laws make provision for the absence or invalidity of a special designation.

The plaintiffs rest their case upon the doctrine of a resulting trust. It is thus stated in their brief: "Provo was admitted as a contributor to this fund and continued as such for many years and up to the time of his death. The certificate was legally issued. The defendant has not made any provision in its laws for a reversion of the benefit fund to the society. These considerations make a strong equitable basis for the plaintiffs' claim. The plaintiffs believe that the decisions of this court have clearly established, as a principle of law, the doctrine of a resulting trust in favor of the insured's estate where there is a failure of the beneficiary."

It becomes necessary to examine into the nature of this so called trust fund. The purpose for which the death fund in societies like the defendant is raised, and the persons among whom it may be finally distributed, are described in the statutes. While a member can receive sick benefits during his life and therefore may be said to be a *cestui que trust* of the funds raised for that purpose, he never can be a beneficiary under a death benefit. He may designate to whom the part named in his certificate may be paid, but even then he must keep within the classes of beneficiaries named in the statute; and a designation outside of these classes is invalid. *American Legion of*

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Honor v. *Perry*, 140 Mass. 580. *Daniels* v. *Pratt*, 143 Mass. 216. In the last case the designation was the estate of the member. It was declared invalid, the court saying, "If it were a part of his estate, it would be assets for the payment of debts and expenses of administration, and would be subject to an unrestricted disposition by will. But this is inconsistent with the statutes, and so beyond the power of the parties." It thus appears that this fund is not created for the member, and that the only power he has over it is a limited power of appointment. If by reason of a valid appointment expressly made by him, or if in case of his failure to make such an appointment there be a provision either in the certificate or in the laws of the association making a valid appointment (which may be regarded as indirectly made by him), then the fund goes to the appointee. But to say that when there is a failure to make a valid appointment the fund shall go to the member as a resulting trust is to announce a result totally inconsistent for the purpose for which the fund was created. There can be no resulting trust which is inconsistent with the trust created by statute.

The case bears no analogy to a life insurance policy in a regular life insurance company, where the company is operated upon a reserve basis and the policy always has a pecuniary or cash surrender value, and where there is no statutory limitation as to the beneficiaries of the fund.

It follows that the demurrer was rightly sustained. Among the authorities bearing upon the general subject see in addition to those cited above, *Bancroft* v. *Russell*, 157 Mass. 47; *Haskins* v. *Kendall*, 158 Mass. 224 (arising under St. 1885, c. 183), *Boyden* v. *Massachusetts Masonic Life Association*, 167 Mass. 242 (arising under St. 1890, c. 421); *Marsh* v. *American Legion of Honor*, 149 Mass. 512, and cases there cited; *Hill* v. *American Legion of Honor*, 178 Mass. 145; *Warner* v. *Modern Woodmen of America*, 67 Neb. 233; *Eastman* v. *Provident Mutual Relief Association*, 62 N. H. 555; also cases cited in 29 Cyc. 159, note 8.

Demurrer sustained.

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HENRY G. RUNKLE *vs.* ALBERT C. BURRAGE & others.
SAME *vs.* SAME.

Suffolk. January 22, 25, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Contract, Rescission. *Equity Jurisdiction*, Rescission of contract, Accounting.

In a suit in equity for a rescission of a contract under which the plaintiff paid money to the defendant as an investment in a certain enterprise, and for an accounting as to the money, it appeared that the only agreement or contract made was that the plaintiff, by his subscription to the enterprise, became interested with the defendant and some other persons whose names he did not know in an "underwriting syndicate for the flotation of certain copper properties in Arizona and New Mexico." The defendant acted as treasurer and manager of the syndicate and the plaintiff paid in his money in reliance upon the defendant's ability to manage and conduct a copper mining enterprise. The defendant failed to exercise reasonable care and prudence in the matter and the enterprise was a failure. There was no evidence of dishonesty or of fraud on the part of the defendant. *Held*, that the bill should be dismissed, since there was no ground for rescission of the contract.

In the absence of fraud, nothing less than conduct on the part of one party to a contract that amounts to an abrogation of it, or takes away its foundation, gives the other party to the contract a right to rescind it.

TWO BILLS IN EQUITY, filed in the Superior Court for the county of Suffolk on September 28, 1903, and April 18, 1905, respectively, and afterwards repeatedly amended, seeking a rescission of certain agreements under which the plaintiff and persons whose claims were assigned to him placed money in the hands of the defendants for investment, and for an accounting as to such money.

The cases were referred to James D. Colt, Esquire, as master and were heard together by him. The material facts reported by him are stated in the opinion. The cases were heard on exceptions to the master's report before *Richardson*, J., who reserved them for determination by this court.

W. I. Badger, (*W. H. Hitchcock* with him,) for the defendants Burrage.

H. Albers, for the defendant Lawson.

C. F. Choate, Jr., (*W. R. Barbour* of New York with him,) for the plaintiff.

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KNOWLTON, C. J. These are two suits in equity brought against Albert C. Burrage, his brother Charles D. Burrage and Thomas W. Lawson, for an accounting, and to recover moneys subscribed by the plaintiff and others towards an enterprise in the sale or management of mining properties alleged to have been undertaken by the defendants. The first suit was brought to recover money subscribed by the plaintiff personally, and the second to recover money subscribed by others who have assigned their interests to the plaintiff. The subscriptions represented in the two suits amount in the aggregate to $406,125, which sum, with interest from May 10, 1899, the plaintiff seeks to recover. The subscriptions were made through one Dickey who was a close and intimate friend of A. C. Burrage both in social and business relations. A part of the master's finding is as follows: "On that day (April 24, 1899) he (Dickey) met Burrage alone by appointment at the office of H. H. Rogers in New York. At that interview Burrage mentioned that Dickey and some of his friends had asked to be allowed to participate in some of the new enterprises which he was inaugurating; that he now had options or agreements for options on a number of copper properties in Arizona and New Mexico, and that he was about to put them together into a new company to be capitalized at $10,000,000 or $15,000,000, and to be called Arimex, a name derived from the words Arizona and New Mexico; that he was willing to let Dickey and his friends take part in the enterprise. He stated that the properties would cost several million dollars, and that Messrs. Rogers, Rockefeller, Daly, Lewishon, Lawson and himself would be the parties interested and would be subscribers; but requested Dickey not to mention their names in connection with the enterprise. He spoke of the Santa Rita mine and the Sisson properties as the ones he intended to consolidate, stating that they were of great value. He mentioned the fact that one of Sisson's options expired on May first, that $225,000 was needed to take it up; that it would be inconvenient to raise this money himself, as he was at that time heavily committed to other enterprises, and that he would allow such of Dickey's friends as wished to become interested in the new enterprise to subscribe and contribute, as a part of the amount to be ultimately subscribed, the sum of $225,000, which was the sum then needed to take up the

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two hundred and twenty-five thousand dollar option. He stated to Dickey that the Arimex was not to be a part of the great copper consolidation which was shortly to be made public and which would be called the Amalgamated Copper Company, and for which he had been getting together properties in Montana when Dickey was there with him in January, 1899. This was the first time Dickey had heard the name 'Amalgamated,' and Burrage requested him not to mention it to any one. The foregoing is the substance of the interview. Nothing else of importance was discussed. Dickey at once went to his friends in Baltimore, Philadelphia, New York and elsewhere, and proposed to them that they should subscribe to the enterprise. He told them that Burrage was behind it, that it was a big copper proposition, and that Burrage had allowed him to obtain subscriptions to a limited amount, and that he was not at liberty to say anything about the properties or their whereabouts. In a very short time the $225,000 was subscribed, and Dickey telephoned Burrage, asking to be allowed to obtain subscriptions to the amount of $350,000. Permission was given, and Dickey telephoned the next day for the right to subscribe $500,000. Again permission was given, this time with some reluctance. In four days at the outside, Dickey had obtained, on the very meagre information above mentioned, subscriptions to the amount of $500,000, and this large sum of money was deposited to his credit in the Liberty National Bank."

At the time of this interview Burrage expected that the Santa Rita mine would be included with the Arizona properties when the enterprise was established, but Dickey did not mention the Santa Rita mine to any of his subscribers. The purchase of the Santa Rita mine was not concluded until June, 1899. It was never included with the Sisson properties, and still remains an independent company.

Some of the testimony of the witnesses as to the representations on which the subscriptions were made is as follows: The plaintiff testified that Dickey told him: "We have a copper proposition now which is better than anything I have been connected with, and will give more money than any enterprise with which I have been connected. I am permitted to let a few people into this enterprise, and will be glad to have you in it.

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He said, I am not able to go into the details, but my expectation is that as soon as these properties are working and showing a profit, they will be taken into the Amalgamated Company." Dickey testified: "I stated very little. I simply stated to Mr. Runkle that Mr. A. C. Burrage was going to put these copper companies together and asked him if he wanted to make a subscription to it." Pritchard, a subscriber, testified of Dickey's statement: "The substance of it was that Mr. Dickey, through his friend Mr. Burrage, had an opportunity to underwrite a venture which was to develop mining properties in Arizona and New Mexico, and if the amount was larger than he cared to put in himself, he was at liberty to take subscriptions from some of his intimate friends, and on those representations, that the properties were to have the personal oversight of Mr. Burrage and his associates, I ventured $5,000." Dickey, referring to the subscribers whom he personally saw, testified as follows: "I told these gentlemen that Mr. Burrage was putting together some copper properties which he was to make into a large company and bring out; that he had given me a limited amount to subscribe among my personal friends, and by his request I was asked not to mention the names of any one connected with him in this enterprise, or even mention the name which he had given me for the name of the properties. That is the sum and substance of the conversation." This testimony fairly represents the only arrangements under which the several sums were subscribed. They were paid over to Dickey and "it was suggested by the defendant, A. C. Burrage, that until the company could be permanently organized the enterprise should be known as the Arimex syndicate, to be composed of all persons in interest, including Dickey's subscribers, and of which Charles D. Burrage should be the treasurer, and this was done. The syndicate was formed to take over the Sisson properties and such other properties as should seem desirable, to solicit and receive subscriptions, give receipts, pay out money for the enterprise, and do everything necessary to be done prior to the formation of the permanent company." Neither of the defendants was a subscriber, but A. C. Burrage "was the moving spirit in the enterprise. He determined the properties which were put into the permanent company, he advanced money, selected or

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supervised the election of the officers, passed upon all papers of importance, and advised and directed in the conduct of the enterprise." On April 28, 1899, $335,000 of this money was lent to Sisson by Charles D. Burrage as treasurer of the syndicate, and a conveyance of Sisson's mining properties was taken as collateral security, with an option to purchase them at a stated price and to treat the money lent as the first payment. Afterwards the purchase was consummated, and $206,000 more was paid Sisson in July, 1899, of which $165,000 was the balance of the subscriptions made through Dickey and $41,000 was advanced by A. C. Burrage. Burrage received no note or other evidence of indebtedness, either from the Arimex syndicate or the Arimex Company for this advance, or for the more than $30,000 which he expended in the purchase of the Angang mine that was joined with the Sisson properties in the same enterprise, and was afterwards controlled by the Arimex syndicate, and later by the Arimex Company. Substantially all sums borrowed since the organization of the Arimex Company in August, 1899, have been borrowed from the defendant, A. C. Burrage. On September 14, 1904, he had lent the company $269,157, which was represented by notes of the company. The amounts borrowed from him since that time were not disclosed by the evidence.

On May 10, 1899, receipts for the several sums which had been contributed by Dickey's friends, indorsed by Dickey, were sent to them in the following form:

"Boston, May 10, 1899.

"Received of Charles H. Dickey dollars, being in full of his subscription of dollars to an underwriting syndicate for the flotation of certain copper properties in Arizona and New Mexico.

"Charles D. Burrage, Treasurer."

On August 4, 1899, the Angang Copper Company, the Oxide Copper Company and the Arimex Consolidated Copper Company were organized under the laws of New Jersey. The capitalization of the first of these corporations was $1,000,000, and that of the second and third was $5,000,000 each. The Table Mining Copper Company, previously organized under the

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laws of Arizona, was capitalized at $10,000,000. The Arimex Company is a holding company which acquired most of the capital stock of the other three companies, and these three companies acquired the Sisson properties held by the syndicate, and the Angang property, which was a mine in Mexico. In January, 1901, after very extensive and costly advertising in different cities, there was an attempt to sell in the market a large amount of treasury stock of the Arimex Company, but this attempt failed utterly. In February, 1901, a letter was sent by Dickey, the president of the Arimex Company, to the subscribers, informing them of the failure of the attempt to sell the stock, and saying that it was thought best to terminate the syndicate pool by sending to subscribers the amount in stock in the Arimex Company to which they were entitled, in return for their trust certificates. Stock was therefore sent in double the amount of the several subscriptions, reckoning the stock at its par value, and was accepted by most of the subscribers in exchange for their trust certificates.

There were no profits from the working of the mines owned by these corporations, and considerable sums were spent in the development of some of them. In 1901 and later, requests were sent by subscribers to the defendants for information in regard to their investments, without obtaining satisfactory answers, and after a tender by the plaintiff to the defendants of the shares of stock which the subscribers had received, these suits were brought.

The plaintiff contends that the arrangement between the subscribers and the defendants has been rescinded for active or constructive fraud, or for a breach of the contract, and asks for a repayment of the amounts subscribed, with interest. Additional findings by the master were as follows: "I find that no one of the defendants ever received any profit or money from, or stock in the enterprise; but on the contrary, A. C. Burrage as above stated, advanced several hundred thousand dollars to the company for development work, exploration work, expenses, etc. All the money, other than the $500,000 received from Dickey's friends, the sale of a few shares of the company's stock, and a comparatively small sum received from ore at the Oxide and Angang properties, came from A. C. Burrage. At the time the

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properties were purchased, he believed them to be very valuable, and there is no evidence that he had changed his belief prior to the bringing of these suits. At the inception of the enterprise, when Sisson first came to Boston, Burrage decided to take up the Sisson properties, with the intention of forming a large mining company to own them and possibly other copper properties. He consulted with Mr. Lawson, with whom he was then co-operating in the formation of the Amalgamated Copper Company, and it was understood between them that Burrage, as an experienced man in the investigation of copper properties and the formation of copper mining companies, should investigate the Sisson properties, and, if satisfied as to their value, form a company to purchase them. Lawson gave his advice when it was asked, but did not take any active part in passing upon the value of the properties or the formation of the company. He took charge of the public offering of stock in the proposed company. Neither he nor Burrage subscribed any money to the enterprise. I do not find that any definite arrangement was made whereby either Lawson, the Burrages or Dickey, were to profit by the undertaking, in case it was successfully floated and the public purchased the stock; but it was the expectation of each of them to profit largely by the enterprise if it turned out a success. . . . The defendants Burrage failed to exercise prudence or good judgment in the purchase of the properties that went into the Arimex Company, and they failed, when requested, to give the plaintiff and his assignors the information concerning the properties to which they, as subscribers, were fairly entitled. . . . The defendants Burrage did not exercise reasonable care and prudence in ascertaining the character, condition and value of the properties acquired from Sisson, before using, investing and expending the funds subscribed by the plaintiff and his assignors."

The fundamental question in the case is, What was the contract or arrangement between the subscribers and the defendant, A. C. Burrage? There is no contradiction in the evidence bearing upon the question. Burrage was planning an enterprise which had not taken definite form, and he gave the subscribers an opportunity to take a part in his undertaking. The nature of the undertaking was stated only in the most general terms.

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The subscribers were not informed where the property was, or who besides Burrage was likely to be interested in it. Dickey, for himself and as the representative of Burrage, made known to the subscribers the opportunity that was given them. They acquired no rights except such as resulted from joining in the enterprise as it was in fact, and as it was represented to them. There is no ground for a contention that there was any intentional or material misrepresentation of fact in the statements in regard to the enterprise. Seemingly, both Burrage and Dickey were then very hopeful in regard to it. In making the proposition, Dickey was requested not to mention the names of persons who would be with Burrage. In referring to the Santa Rita mine and the Sisson properties, Burrage only spoke of his intention, and did not bind himself to procure either of them. He was not then the owner of either of them. They were not mentioned by Dickey to any subscriber. While the subscribers had an interest, and perhaps might have had a voice, in the further promotion of the plant as soon as they were accepted as members of a contributing syndicate, it was evidently expected that Burrage would be the principal manager of the business. The master has found that the subscribers "paid their money in reliance upon the ability of A. C. Burrage to manage and conduct a copper mining enterprise," and that they left everything to him, taking no action in the business until long after the certificates of stock were sent them in exchange for their trust certificates in the syndicate.

It was the legal duty of Burrage to act fairly and in good faith in dealing with the interests of the subscribers as joint owners in the business. But in being admitted as sharers in an enterprise which he was conducting primarily for his own profit, it was an implied understanding of the parties that, so far as he acted without objection, he was to exercise his own judgment for the common good. It was his enterprise, in which they were to share, and he agreed that so far as he managed it, he would act honestly and in good faith. If he was called upon to use any more skill, care or judgment, in the matters in which they were jointly interested, than he thought sufficient for the protection of their common interests, which we do not decide, his omissions in that particular are immaterial in the decision of

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this case. The finding of the master that he did not exercise reasonable care and prudence in ascertaining the character, condition and value of the properties acquired from Sisson, before using, investing and expending the funds subscribed by the plaintiff and his associates, does not establish a right on the part of the subscribers to rescind the contract and reclaim their money.

The contention of the plaintiffs that there was a breach of the contract, or a lack of good faith on the part of the defendants, in the failure to include in their enterprise the Santa Rita mine, or in the final determination of what properties should be included, or what price should be paid for them, is not supported by evidence. In these particulars the arrangement was indefinite, and the determination was left to Burrage and his associates. The master has found that he thought the selected properties very valuable, and there is every reason to believe that he thought the enterprise would be successful. The fact that he invested a large amount of his own money in it, an amount much larger than that contributed by any of the subscribers represented by the plaintiff, is strong evidence in his favor.

Nor does the evidence show dishonesty or bad faith on the part of the defendants in procuring the organization of corporations to hold the property. The fair inference is that the plaintiff and the other subscribers expected in the beginning that the enterprise would be conducted in this way. Very likely a sale of stock in the market was expected by the subscribers, as a probable source of great profit. The dealings between the syndicate and these corporations, and between the Arimex Company and the other corporations is not shown to have been prejudicial to the stockholders in the Arimex Company. In the dealings of the several corporations with one another and with the members of the syndicate, it does not appear that either of the defendants acted dishonestly, or in bad faith towards the subscribers. Nor is it shown whether the ownership of the subscribers in the Arimex Company, represented by their certificates of stock, is all that they should have received under their arrangement with A. C. Burrage. So far as appears, most of the other stock has never been issued, and is held by the corporation as contemplated stock. The plaintiff's claim has not been presented with a view

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to showing whether, if the conduct of the defendants in organizing the corporations was authorized and binding, the subscribers have received such interests in the corporations as they were entitled to have. If entitled to relief in this particular by way of accounting or otherwise, it could hardly be obtained without making the Arimex Company a party to the suit, and perhaps the other corporations also.

The report of the master shows that A. C. Burrage was willing to allow his friend Dickey and Dickey's friends to share with him in an enterprise from which he expected large profits for himself and them. As he was then engaged in other large enterprises, he wanted the help of associates who would subscribe capital towards the purchase of some of these mining properties. He was deceived by Sisson, who presented statements and furnished recommendations which so far won his confidence that he failed to make such thorough, independent investigation as reasonable care and prudence required. He prosecuted the enterprise substantially as originally contemplated, but the mining enterprise turned out to be of little value, and the result was a disastrous failure. Subsequently he unreasonably and improperly refused the request of the subscribers for information of the particulars of his action.

In the general management of the business, until the time came for determining how many shares of the stock and what part of the property the subscribers were entitled to receive, Burrage was not acting in matters in which he had a personal interest adverse to the subscribers, in such a way as to subject him to the strict rule which applies to those acting for themselves in the business of others to whom they stand in a fiduciary relation. In a sense he was acting as their agent and trustee in matters in which he and they had a common interest. They were *quasi* partners with him in the enterprise, and his relation to them was analogous to that of a partner to his copartner. It is not suggested that his advances to the Arimex Company by way of loans were not made in good faith, with a view to the best interests of the corporation.

If it were assumed in favor of the plaintiff that Burrage was under a legal duty to use ordinary care in the management of the business, so that he would be liable in damages for neglect

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in that particular, this would not be a ground for a rescission of the contract between them. *Ballou* v. *Billings*, 136 Mass. 307. *Weintz* v. *Hafner*, 78 Ill. 27. *Luce* v. *New Orange Industrial Association*, 39 Vroom, 31. *Moore* v. *Cross*, 87 Texas, 557. *Harrington* v. *Rutherford*, 38 Fla. 321. 24 Am. & Eng. Encyc. of Law, (2d ed.) 619, and cases cited.

In the absence of fraud, nothing less than conduct that amounts to an abrogation of the contract, or that goes to the essence of it, or takes away its foundation, can be made a ground for rescission of it by the other party. In this case there is no evidence of fraud in the inception of the contract, or in the management of the business which was conducted for the joint proprietors. Whether the defendant A. C. Burrage and his brother C. D. Burrage, who acted under his direction, have dealt fairly and in good faith with the plaintiff and the other subscribers in assigning them the stock which was sent them as their share in the property, the evidence does not enable us to determine. Their action in this part of the business was not binding on the subscribers, and the evidence indicates that the acceptance by the subscribers of the shares of stock was not made under such circumstances as to be binding upon them. But no question of this kind has been presented to us, and we need not consider it. Our decision is without prejudice to the presentation of this question in another suit.

The evidence does not connect Lawson with the subscribers in such a way as to show a legal liability of any kind. Upon the cases before us the entry in each case must be

Bill dismissed.

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EMMA P. FROST *vs.* BENJAMIN S. FROST & another, trustees & executors.

Suffolk. January 28, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Assignment, Validity. *Trust*, Creation. *Insurance*, Life. *Words*, "My will."

An assignment of life insurance policies made to the trustees to be named in the will of the assignor, for the sole use and benefit of the assignor's wife, who has assented to this provision for her benefit, is of no effect unless it is executed and attested as a will, because it cannot take effect until after the death of the assignor and does not create a present trust.

In an assignment made to "the trustees to be named in my will" the phrase "my will" must be held to mean the document finally admitted to probate as the will of the assignor.

The provision of R. L. c. 118, § 73, that "every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall enure to her separate use and benefit, and to that of her children," has no application to an assignment of a life insurance policy purporting to be made to the trustees to be named in the will of the assignor, for the sole use and benefit of the wife of the assignor, because such an attempted assignment is of no effect, so that the policy never has been legally assigned for the benefit of the wife or in any way legally made payable to her.

BILL IN EQUITY, filed in the Supreme Judicial Court by the widow of Albert G. Frost, late of Boston, who died on October 24, 1907, and whose will was admitted to probate, the defendants being named therein as trustees and executors and having qualified by giving bonds as required by law, praying to have the defendants declared to be trustees for the plaintiff's sole benefit under assignments of five life insurance policies alleged to have been made by her husband on May 17 and August 4, 1898, and that the defendants be ordered to pay to her the amounts of life insurance received by them as executors and trustees under the policies in question.

The case was referred to William H. H. Emmons, Esquire, as master. He filed a report in favor of the plaintiff. The defendants filed ten exceptions to the report, of which only the

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second and sixth are now material. Those exceptions were as follows:

2. To the master's ruling that "Upon the foregoing facts I rule as matter of law that the prayer of the bill should be granted and that the plaintiff is entitled to recover of the defendants as trustees $17,327.69 and also such interest thereon as may accrue after it was received by them."

6. To the master's report because he did not rule, as requested, that the assignments of said policies were inoperative and void.

The assignments, which were brief, are described in the opinion.

The case came on to be heard before *Loring*, J., who reserved it upon the pleadings, the master's report and the exceptions thereto for determination by the full court, such decree to be entered as justice and equity might require.

A. F. Converse, for the defendants.

S. H. Tyng, for the plaintiff.

HAMMOND, J. One of the questions is whether the assignments were valid. The plaintiff does not contend that there was a gift, but insists first that the assignments were operative as a perfected trust, and second, that there was a "statutory investiture" under St. 1894, c. 120, which was in force when the policies were taken out and assigned.

1. Was the trust perfected during the lifetime of the assignor? There were five policies, of which two were each payable to his executors, administrators and assigns, and three were each payable to his legal representatives. Each assignment was of all his right, title and interest "in and to said policy, subject to all its terms and conditions," and each was made to "the trustees to be named in my will," for the sole use and benefit of the plaintiff. The master has found that the plaintiff was informed of these assignments and that she assented thereto; and we think the facts reported by him warrant such findings. But she testified that she never saw any of these policies, nor any of the assignments, until after her husband's death; and the master has further found that "these insurance policies and assignments were matters of common knowledge among the brothers and sisters of the testator; also that they discussed them at

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times with the plaintiff; also that they were mistaken in supposing that these assignments gave to the plaintiff only the income of the proceeds of these policies for her life, and that the plaintiff had knowledge that her husband had made provision of some kind for her, by means of these policies and assignments, and that she was willing to accept, and did accept, such provision, whatever it might be, just as her husband made it, but did not see these policies and assignments, and was not informed about the details of the provision made for her therein until after his death."

Who were the assignees? They were to be named in his will. What will? Was it to be the first testamentary document he should thereafter make, whether or not revoked before his death, or was it to be the one which should finally be admitted to probate as his will? The assignor actually made three wills after the assignments were executed and "the trustees named in the different wills were not exactly the same." There can only be one sensible interpretation of the phrase "my will." It must be held to mean the document finally admitted to probate as the will of the assignor. It is certain, therefore, that the trustees could not be finally ascertained until after his death. The assignment could not be delivered to the assignees until after his death. There is nothing to indicate that he intended to make any delivery to any third person to hold for the trustees until they were finally ascertained, nor is it shown upon the facts in the case that he intended to hold the policies himself as trustee. While it is true, as contended by the plaintiff, that the trustees when finally ascertained would derive their appointment under the assignment and not under the will, still it remains equally true that they could not be appointed, nor even ascertained, until after the death of the assignor. It is to be noted that the papers were all retained by the assignor.

Here then is a case where no assignments are delivered to the assignees, nor can they be delivered until after the assignor's death, where also there is no delivery to any one for them and where it does not appear that the assignor intends to hold for them. The language of the assignments seems to point to a testamentary intention, and the whole scheme is manifestly not to take effect as an operative assignment during the lifetime of

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the testator. The assignments were of a testamentary nature, and, not being witnessed as required by the statutes concerning wills, were inoperative after his death.

Nor is the defect cured by the assent of the *cestui que trust* to the assignments. While such an assent might have a bearing upon the validity of the trust if there was any question as to notice or acceptance, still it has no effect upon the validity of the assignments upon which the trust depends. The question is not simply whether, assuming the validity of the assignments, the trust was good, but is much deeper, and is whether the assignments upon which alone the trust depends ever became operative in law. The case is plainly distinguishable from *Kendrick* v. *Ray*, 173 Mass. 305, upon which the plaintiff relies. There the trustee was the beneficiary named in the policy; and the question was as to the terms of the oral trust upon which he received the insurance, and not as to the validity of the appointment of the trustee. See also *Gould* v. *Emerson*, 99 Mass. 154.

Upon the facts in the case these assignments never took effect within the lifetime of the assignor, for want of assignees, and never took effect after his death for want of proper attestation. There was therefore nothing upon which to base the contemplated trust, and it never was perfected.

2. What has been said disposes also of the contention that there was a "statutory investiture" in the plaintiff. St. 1894, c. 120, (now a part of R. L. c. 118, § 73,) upon which this contention is based, runs thus: "Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject" to certain provisions not here material. These policies were not made payable to the plaintiff, nor, for reasons hereinbefore stated, were they ever legally assigned for her benefit or in any way legally made payable to her. Hence they are not within the statute.

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It follows that the second and sixth exceptions of the defendant to the master's report must be sustained. It becomes unnecessary to consider the other exceptions. The order must be

Bill dismissed.

FREEMAN H. LOTHROP, Judge of Probate, *vs.* ELIZABETH G. PARKE, executrix, & others.

NORTH AVENUE SAVINGS BANK *vs.* ELIZABETH G. PARKE, executrix.

Barnstable. Suffolk. January 29, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Executor and Administrator. Bond. Scire Facias. Agency. Words, "Debts."

In R. L. c. 149, § 2, providing that the executor of a will, who also is the residuary legatee thereunder, may give a bond as therein provided "with condition to pay all debts and legacies of the testator," the word "debts" includes all enforceable claims, and makes the executor liable on his bond for the benefit of a savings bank, which has obtained a judgment against the executor on a claim founded on the fraud of the testator, who, while standing in a fiduciary relation to the bank, induced it to lend money upon security of little value.

On a writ of *scire facias* against an executor, who also was the residuary legatee of his testator, and under R. L. c. 149 gave a bond conditioned to pay all debts and legacies of the testator, in which the plaintiff makes a suggestion of waste under R. L. c. 172, § 8, and shows that he obtained a judgment against the defendant as executor on which an execution was returned unsatisfied, the defendant may defeat the action by showing that in fact there was no waste, and for that purpose he may show what the assets of the estate were and how they were used.

At the trial of a writ of *scire facias* against an executrix, it appeared that the defendant, who was the residuary legatee under the will of the testator, had given a bond to pay all debts and legacies, that the plaintiff had obtained a judgment against her as executrix on which an execution against her had been returned unsatisfied, and brought the writ upon a suggestion of waste, and that the defendant had filed an account by which it was shown that she had paid debts of the testator to an amount considerably larger than the amount of the assets of his estate. The defendant testified that she had no actual knowledge or notice of the plaintiff's claim until after all the assets had been paid to other creditors, nearly two years after the date of her appointment. There was testimony for the plaintiff that the defendant's son, who acted for her in some matters in the settlement of the estate, was shown the plaintiff's papers and was informed of the plaintiff's claim at a time which probably was before the payment of the claims of some of the other creditors. The defendant's son died before the trial. The plaintiff contended that the defendant should at least have declared the estate

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insolvent, so that the plaintiff might receive his share. The judge, who heard the case without a jury, found as a fact that the defendant had no actual knowledge of the plaintiff's claim and had no notice of it, unless as matter of law the communication to her son constituted such notice. The judge ruled that the defendant might show that in fact there was no waste, and found that she had established the fact by her evidence. *Held*, that the judge was not bound to find as matter of law, either that the defendant's son was so far her general agent as to bind her in a special matter of this kind by his knowledge of the testator's liability to the plaintiff, or that the information given to him was so convincing as to be equivalent to knowledge; that the ruling of the judge that the defendant might show that there was no waste was correct, and that his finding that she had established the fact by her evidence was warranted.

TWO ACTIONS, the first on a probate bond given by the defendant Elizabeth G. Parke, as executrix and residuary legatee of the will of her late husband, George W. Parke, the other defendants being the sureties thereon, and the action being brought for the benefit of the plaintiff in the second action, and the second action being a writ of *scire facias*, brought to enforce against the defendant personally on a suggestion of waste a judgment obtained against her as executrix. Writs dated respectively October 31, 1907, and October 1, 1908.

In the Superior Court the cases were tried together before *Lawton*, J., without a jury. The facts are described in the opinion. It was conceded by the plaintiff that, if it recovered in the first action, the amount so recovered should be deducted from the amount which it would otherwise have recovered in the second action; but the plaintiff claimed the right to recover the full amount due under its execution in the second action if it did not recover anything in the first action.

In the action on the bond the judge found for the plaintiff for the penal sum and interest as against all the defendants.

In the *scire facias* case he ruled that, notwithstanding the form of the probate bond, the defendant might show that there had in fact been no waste, that the burden was on her to establish that fact, and that she had established it by her evidence; and further that the defendant was, notwithstanding the form of the bond, entitled to show by evidence the facts shown by her, and that such facts constituted a defense to this action.

The judge found for the defendant in the second action.

By agreement of the parties the judge reported the cases for determination by this court. If the rulings were correct, judg-

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ment was to be entered in the first case for the plaintiff in the penal sum of the bond, $500, and execution was to issue for $500, with interest thereon from the date of the writ, and in the second case judgment was to be entered for the defendant; otherwise, such judgment or order was to be made in each case as the law and the facts required.

The cases were submitted on briefs.

W. E. Hutchins & H. I. Cummings, for the plaintiffs.

H. T. Richardson, for the defendants.

KNOWLTON, C. J. The first of these cases is an action upon a probate bond to pay all debts and legacies of a testator, given by the principal defendant as residuary legatee with sureties, under the provisions of the R. L. c. 149, § 2. The action is brought for the benefit of the plaintiff in the second action, who recovered judgment against the executrix, upon a claim founded on the fraud of the testator, whereby, while standing in a fiduciary relation to the plaintiff, he induced the plaintiff to lend money on what it supposed to be good security, when in fact the security was of little value. An execution was issued upon the judgment and it was returned unsatisfied. If this liability of the estate was a debt within the meaning of the statute, there is no defense to the action upon the bond.

It is rightly contended that, in the strict technical meaning of the word "debt," this claim was not a debt at the time of the death of the testator. But the Superior Court held that it was a valid claim against him which survived his death and was enforceable against his estate. See *Warren* v. *Para Rubber Shoe Co.* 166 Mass. 97; *Parker* v. *Simpson*, 180 Mass. 334; *Leggate* v. *Moulton*, 115 Mass. 552. For the purposes of the present case the judgment must be held to have established conclusively the validity of the claim against the estate of the testator. *Conant* v. *Stratton*, 107 Mass. 474.

The important question is what construction should be given to the word "debts" in this statute. It is sometimes used in a very broad sense, such as to include all enforceable demands, and even moral obligations, although its ordinary meaning is narrower. *Atlas Bank* v. *Nahant Bank*, 3 Met. 581. *Cook* v. *Bartholomew*, 60 Conn. 24, 26. *State* v. *Georgia Co.* 112 N. C. 34, 37. *Scott* v. *Neeves*, 77 Wis. 305, 310. *Baltimore* v. *Gill*,

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31 Md. 375, 390. The purpose of this statute is, in proper cases, to substitute the bond of the residuary legatee for the assets of the estate as security to all persons who are entitled to be paid out of the assets. If a bond is given no inventory or account need be filed. The bond provides for the payment of legacies as well as debts. The nature and purpose of the obligation are well set forth in *Jones* v. *Richardson*, 5 Met. 247. The legislative intent was to provide this mode of payment for all who are entitled to be paid from the estate. On giving a sufficient bond, the executor is not required to retain assets for the payment of any claims. The word "debts" is equivalent to valid claims which are payable by the executor from the property of the deceased person. We are of opinion that the word, as used in this section, includes all enforceable claims, and that this judgment is covered by the bond. In this particular the sureties are bound equally with the principal on the bond. *Wood* v. *Barstow*, 10 Pick. 368. *McKim* v. *Haley*, 173 Mass. 112.

The second suit is by a writ of *scire facias*, brought under the R. L. c. 172, § 8, because of a recovery of judgment against the executrix and a return of the execution unsatisfied. These facts, upon a suggestion by the judgment creditor that there has been waste, impose upon the executrix a personal liability for the amount of the judgment, unless she shows cause to the contrary by proving that the suggestion of waste is incorrect. In the present case the defendant has filed an inventory and an account, by which it appears that she has paid debts of the testator to an amount considerably larger than the amount of his assets. The judge ruled that the defendant might show that in fact there was no waste, and found that she had established the fact by her evidence.

We are of opinion that the ruling was correct. While it is said in many cases that the giving of a bond to pay all debts and legacies is a conclusive admission of assets sufficient to pay the debts (see *Jones* v. *Richardson*, 5 Met. 247, *National Bank of Troy* v. *Stanton*, 116 Mass. 435, *Thayer* v. *Winchester*, 133 Mass. 447), this means conclusive as against a defense of no assets, set up in a suit upon the bond, or in a suit against the executor to recover a judgment against the estate, or in a suit

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upon his independent personal promise to pay. It does not mean that, in a proceeding founded upon alleged waste of the estate which creates a liability under this section, the executor may not show what the assets of the estate were and how they were used. *Jenkins* v. *Wood*, 140 Mass. 66. *Jenkins* v. *Wood*, 134 Mass. 115. The giving of the bond does not create a liability on the part of the executrix to an action against her personally, except upon the bond, and it does not deprive her of the right to show that in fact there was no waste, if she is sued in *scire facias* under the R. L. c. 172, § 8.

The inventory and account, with the testimony of the defendant in support of them, show that the assets were properly administered. The case of *Jenkins* v. *Wood*, 144 Mass. 238, goes no further than to hold that it would not be proper administration for an executor, after giving such a bond, to use a part of the assets to pay his own personal debt and leave another debt unpaid. The only debatable question as to the suggestion of waste in the present case grows out of the testimony that the defendant's son, who acted for her in some matters in the settlement of the estate, was shown the plaintiff's papers and informed of the plaintiff's claim, at a time which was probably before the payment of some of the other creditors, and it is contended that the defendant should at least have declared the estate insolvent, so that the plaintiff might receive its share. The defendant testified, and there was no one to contradict her, that she had no actual knowledge or notice of the plaintiff's claim until after all the assets had been paid to other creditors, nearly two years after the date of her appointment. The son died before the trial. The judge found as a fact that she had no such knowledge or notice, unless, as matter of law, she was charged with notice from the facts stated in his report. These facts are the claim made upon her son, with an exhibition of the papers relied on by the plaintiff, and the relation of the son to the business of settling the estate. The evidence does not show that the judge was bound to find as matter of law, either that the defendant's son was so far her general agent as to bind her, in a special matter of this kind, by his knowledge of the testator's liability to the plaintiff, or that the information given him was so convincing as to be equivalent to knowledge. Perhaps the evidence would

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have warranted a finding in favor of the plaintiff on both of these points. But it is plain that the udge was not bound as matter of law to make such a finding.

Judgment is to be entered in favor of the plaintiff in the first case, and of the defendant in the second case, in accordance with the terms of the report.

So ordered.

ALFRED L. MILLER & others *vs.* ELDORA M. ALDRICH.

Worcester. March 2, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Pleading, Civil, Declaration, Demurrer. *Limitations, Statute of*, Must be pleaded in answer. *Corporation*, Foreign, Liability of stockholder. *Evidence*, Proof of foreign law.

Upon the argument of a demurrer to a declaration containing allegations in regard to the law of another State, where the counsel on both sides refer to decisions of the courts of that State to show what the law is there, this court cannot consider the cases thus cited to them upon that question, which is one of fact.

Upon the argument of a demurrer to a declaration containing allegations in regard to the law of another State, whatever is well averred in the declaration as to the law of that State must be taken to be true, being admitted by the demurrer as a fact.

The defense that an action is barred by the statute of limitations cannot be taken by demurrer.

No action can be maintained to enforce against a resident of this Commonwealth, who is a stockholder in an insolvent corporation organized in another State, a personal liability for the debts of such corporation created by the statutes of such other State, where it does not appear that the statutes of such State, as construed by its courts, have provided any remedy for the enforcement of the statutory liability which can be made available outside that State.

CONTRACT against a stockholder in a corporation organized in the State of Colorado residing at Worcester in this Commonwealth to enforce the alleged personal liability of the defendant under the statutes of Colorado. Writ dated September 17, 1907.

The declaration was as follows:

"The plaintiffs say that the defendant is a stockholder in the State Bank of Monte Vista and on June 15, A. D. 1899, and at

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all times thereafter owned, and now owns sixty shares of the capital stock of said bank of a par value of one hundred dollars.

"That said bank of Monte Vista was and still is a corporation duly organized under the laws of the State of Colorado on or about August 1, A. D. 1890; that said bank did a general banking business in Monte Vista and Hooper in the County of Rio Grande, and in Creede in the County of Mineral, in said State of Colorado, until June 15, 1899, when said bank became insolvent, and on that day made an assignment of all its assets, under the laws of said State of Colorado, to Norman H. Chapman of said Monte Vista.

"That at the time of the organization of said bank the laws of the State of Colorado for 1885, at page 264, Sec. 1, which is now known as Sec. 533 of Mill's Annotated Statutes, provided as follows:

"'Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts, and engagements of said associations, in double the amount of the par value of the stock owned by them respectively.'

"Said section has at all times since the organization of said bank been, and now is, in full force and effect, and has been interpreted by the Supreme Court of the State of Colorado, which is the highest court of said State, to impose an individual liability upon each stockholder of said bank of double the par value of stock held by each stockholder, in addition to the amount of the subscription for said stock; that this liability is solely for the benefit of the creditors of the bank, and constitutes a fund exclusively for the benefit of all the creditors, and forms no part of the assets of the corporation, and the right of action to enforce said liability accrues to the creditors themselves and not to the assignee of said bank.

"And the plaintiffs say that on June 9, A. D. 1905, certain creditors of said bank brought an action for and on behalf of all the creditors of said bank against said State Bank of Monte Vista, and Norman H. Chapman, assignee thereof, and all the stockholders thereof, including this defendant, in the District Court of the City and County of Denver in the State of Colo-

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rado, to ascertain and fix the amount due from each stockholder to the creditors of said bank under said liability above set out, upon an accounting of all the assets and indebtedness of said bank; and that it appears from the proceedings and record in said case that judgments have been rendered against all the stockholders of said bank who reside in the State of Colorado, and $3,250 has been collected on said liability from those who are solvent and applied on the indebtedness of said bank to the creditors, and that executions have issued against all the others and been returned 'No property found.'

"And the plaintiffs say that Sec. 12 of the Civil Code of Colorado, Acts of 1887, provide as follows:

"'If the parties to the action, those who are united in interest, shall be joined as plaintiffs, or defendants, but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and the court may make an order that the action be so prosecuted or defended.'

"And the plaintiffs say that under said Section 12 of the Civil Code, said court duly entered a decree on June 21, A. D. 1907, a copy of which the plaintiffs crave leave to produce at the trial of this action in proof thereof, whereby said Alfred L. Miller, Dan Workman and Phœbe C. Smith, the above named plaintiffs, were appointed to represent all creditors, and are authorized to sue for the benefit of all the creditors of said State bank and bring all necessary actions and proceedings for the purpose of collecting the stock liability from the stockholders of said bank residing outside of the State of Colorado, to the end that any and all sums so collected by them be divided ratably among the creditors of said bank in proportion to the amount of their respective claims; and by said decree it further appeared that after deducting the amounts paid by the assignee, derived from the assets and the amounts paid on the stock liability, as aforesaid, there was still due from said bank to the plaintiffs and the other creditors, the sum of $84,819.89; that said bank is wholly

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insolvent and without money or property from which said sum can be collected in whole or in part, and that no judgment rendered therein against said bank can be collected by execution, or otherwise; that in order to raise a fund to pay the remainder of said amount, to wit, $84,319.89, still due from said bank to the plaintiffs and the other creditors, and in order that the same be prorated equally among the stockholders, according to the amount of stock held by each of them, it is necessary for the remaining stockholders, who have not paid anything to pay 53½ per cent. of their stock liability; and by said decree, the defendant is adjudged liable to the plaintiffs upon the said number of shares to an assessment of $6,420, to be collected by the plaintiffs for the benefit of all the creditors of said bank.

"Wherefore the plaintiffs say that the defendant owes them the amount of said assessment, with interest thereon."

The defendant filed the following demurrer:

"And now comes the defendant in the above entitled cause and demurs to the plaintiffs' declaration, and assigns specially as causes of demurrer the following:

"First. It appears that under said alleged statute of Colorado as construed by the highest court of said State the alleged right of action accrued to the creditors themselves and so accrued on June 15, 1899, when said alleged bank became insolvent and made an assignment for creditors, and that said alleged rights of creditors, therefore, accrued more than six years before the suing out of the plaintiffs' writ and was barred by the statute of limitations.

"Second. That the declaration does not state a legal cause of action substantially in accordance with the rules contained in R. L. c. 173.

"Third. It appears that the plaintiffs are not statutory assignees, and are powerless to enforce in this Commonwealth the alleged rights of the creditors. [Followed by subdivisions *a* and *b* here omitted.]

"Fourth. That the pretended decree, entry whereof is alleged in the support of this action, does not appear, on the allegations of the declaration, to be such a decree as to be entitled to faith, credit or effect in the courts of this Commonwealth, and therefore does not support the action, or show any cause of action

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against this defendant in favor of the plaintiffs." [Followed by subdivisions *a*, *b*, *c*, *d*, *e* and *f* here omitted.]

In the Superior Court *Gaskill*, J., overruled the demurrer, and, being of the opinion that the matter ought to be determined by this court before any further proceedings in the trial court, reported the case for determination by this court, and stayed all further proceedings except such as were necessary to determine the rights of the parties.

T. D. Cobbey (of Colorado) & *W. R. Bigelow*, for the plaintiffs.

C. H. Hanson, for the defendant.

SHELDON, J. In the argument of this case counsel on both sides have referred to the decisions of the courts of Colorado as showing the law of that State. But as any question of foreign law including the law of any other State must be treated here as a question of fact, we cannot go beyond the averments of the declaration to ascertain either the common or the statutory law of Colorado, except as we may be aided by the presumption that the common law of that State is the same as our own. *Demelman* v. *Brazier*, 193 Mass. 588, 592. *Cherry* v. *Sprague*, 187 Mass. 113. Accordingly we cannot consider or refer to any of the Colorado decisions which have been cited to us, except as evidence of the common or general law, just as we may and do refer to decisions rendered elsewhere. Whatever is well averred in the declaration as to the law of Colorado must now be taken to be true. *Hancock National Bank* v. *Ellis*, 166 Mass. 414, 419. *Hanley* v. *Donoghue*, 116 U. S. 1.

There is much ground for upholding the defendant's contention that on the face of the plaintiffs' declaration the right of action which they seek to enforce accrued on June 15, 1899, when the State Bank of Monte Vista became insolvent and made an assignment of all its assets for the benefit of its creditors, and so that this action is barred by the statute of limitations. *Bennett* v. *Thorne*, 36 Wash. 253, and cases there cited. But it does not follow that the demurrer can be sustained for this reason. That ground of defense must be taken by answer, and not by demurrer. *Hodgdon* v. *Haverhill*, 193 Mass. 327, 330, and cases there cited. *McRae* v. *New York, New Haven, & Hartford Railroad*, 199 Mass. 418. We proceed accordingly to consider other grounds of demurrer.

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The plaintiffs do not seek to maintain this action as creditors. Indeed, except inferentially, there is no averment that they are themselves creditors. They rest their right upon a decree of the Colorado court by which they were appointed to represent the creditors and to collect for the creditors the amount of the corporate indebtedness which the bank is unable to pay. We do not doubt that all stockholders, including the defendant, would be bound by proceedings properly taken in the Colorado court to determine their liability. But it does not appear that the proceedings taken in Colorado were in accordance with the provisions of any statute or rule of law fixed by the decisions of its courts and in force when the defendants became stockholders and incurred their contractual liability as such. The reason for the rule adopted in *Converse* v. *Ayer*, 197 Mass. 443, *Francis* v. *Hazlett*, 192 Mass. 137, and *Howarth* v. *Lombard*, 175 Mass. 570, fails here. The difficulty is not merely as to the plaintiffs' right to sue in their own names. Though not called receivers, they yet might perhaps be shown to have become *quasi* assignees of the right of action within the rules stated in *Howarth* v. *Lombard*, 170 Mass. 570, 579, and *Bernheimer* v. *Converse*, 206 U. S. 516, 534. But the difficulty goes deeper. It does not appear that the statute of Colorado, as construed by its courts, has provided any remedy for its enforcement which can be made available outside that State. *Erickson* v. *Nesmith*, 15 Gray, 221; *S. C.* 4 Allen, 233. *Clark* v. *Knowles*, 187 Mass. 35. That did appear or was assumed, so far as we have been able to ascertain, in the cases in which, under similar circumstances, suits like this have been sustained against the domestic stockholders of foreign corporations. See, beside cases already referred to, *Bank of North America* v. *Rindge*, 154 Mass. 203; *Abbott* v. *Goodall*, 100 Maine, 231; *Pulsifer* v. *Greene*, 96 Maine, 438; *Miller* v. *Willett*, 4 Rob. (N. J.) 396; *Olson* v. *Cook*, 57 Minn. 552; *Terry* v. *Little*, 101 U. S. 216; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747.

This action is not in any sense brought to enforce a judgment rendered by the Colorado court; it seeks only to enforce the defendant's original statutory liability. *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337, *et seq.* *Hale* v. *Allinson*, 188 U. S 56, 81. *Bennett* v. *Thorne*, 36 Wash. 253, 259. That court did not assume to give any judgment against the

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non-resident stockholders. But it does not appear that there is or was in Colorado any statute or any fixed rule of law authorizing such proceedings as were had and so making them final and conclusive upon all stockholders as being represented by the corporation itself. The statute set out in the declaration merely established a rule of practice. It cannot be given any further effect.

Accordingly the order of the Superior Court overruling the demurrer must be reversed, and the demurrer must be sustained for the third reason therein assigned.

So ordered.

CHARLES B. LENTELL *vs.* BOSTON AND WORCESTER STREET RAILWAY COMPANY.

Middlesex. March 2, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Damages, For property taken or injured under statutory authority. *Way*, Extent of public easement. *Elevated Railway.*

Upon a petition for the assessment of damages under St. 1908, c. 168, § 8, for injury to the petitioner's dwelling houses on Boylston Street in Newton by the trestle constructed, and used during a certain period, by the Boston and Worcester Street Railway Company over and across the tracks of the Boston and Albany Railroad on that street under the authority given by § 1 of the same chapter, it appeared that the trestle was a structure of timber twenty feet high and was erected in the middle of the street in front of the petitioner's houses, and that the effect of its construction and operation was very similar to that produced by the construction and operation of an elevated railway in a large city, and there were facts which warranted a finding that the trestle, if its construction had not been authorized by the statute, would have been a private nuisance of a grave character to the petitioner's property, and that its maintenance, in the absence of such authority, would have been a use of the street which would have been unreasonable under the general taking. *Held*, that upon such a finding the right to construct and use the trestle could not be included in the easement acquired by the public when the street was laid out, and that under St. 1908, c. 168, there would be a taking of the petitioner's property by right of eminent domain, which would make him a person "legally damaged in his property by the construction, maintenance or use of the said trestle" under § 8 of that statute. *Held, also*, that the fact that the damage was not permanent did not affect the petitioner's right to recover compensation for that which he had suffered.

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KNOWLTON, C. J. This is a petition for the assessment of damages under the St. of 1903, c. 163,* for the erection and maintenance of a trestle on Boylston Street in the city of Newton, in front of the petitioner's premises. It was agreed that, if the judge † was of opinion that the petition could be maintained on the agreed facts and the testimony, he might order a formal verdict for the petitioner for $500. The judge ruled that the facts and evidence would warrant this verdict, and he directed the jury to return it accordingly, reporting the case for our determination. The question before us is whether this ruling was right.

This trestle was to carry the street railway over the tracks of the Boston and Albany Railroad. The petitioner owned two houses opposite the trestle, one occupied by himself and the other by a tenant. The trestle was a structure of timber, very similar to a coal trestle used for coal cars. It was constructed in the middle of the street, and it started east of the plaintiff's property at the grade of the street, and rose gradually as it went west until it got to a height above the railroad of twenty feet to the top of a board fence, built along on either side of it to a height four feet above the ties on which the rails were laid. In front of the plaintiff's house it was twelve feet to the top of the board fence. Although there was a plank on top upon which one could walk, the public were prohibited from walking on it. There were bents, or upright posts, on which the stringers were laid, and there were braces placed in such a way that no vehicles could pass through. It was fifteen feet wide at the base and twelve feet at the top. There were two tracks over it, but they were placed in such a way that the outward and inward bound cars, which used different tracks, could not pass on the trestle at the same time while going in opposite

* Section 3 of that statute is as follows: "The construction, maintenance and use of the said trestle shall be deemed not to be an additional easement or servitude. If any person is legally damaged in his property by the construction, maintenance or use of the said trestle the damages may be assessed by a jury of the Superior Court upon proceedings conducted as provided with respect to the laying out of ways in the city of Newton."

This section was held to be constitutional in a suit in equity between the same parties in an opinion reported in 187 Mass. 445.

† *Stevens*, J.

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directions. The cars in use were large, heavy electric cars. The total length of the trestle on both sides of the steam railroad was about six hundred feet, and the evidence tended to show that it was a great source of inconvenience and annoyance to the petitioner and his family in the use of his premises. It obstructed their view and the free entrance to their house from the front, and it obstructed the light and air. While it was being constructed the street between the plaintiff's house and the trestle was completely blocked with timber, so that horses and carriages could not get to the house, and so long as the trestle remained, it was not safe to hitch horses or leave horses in front of the house, on account of the noise of the cars overhead. There were search lights on the cars at night, which would make the rooms as light as day, and interfere with persons trying to sleep. Before the trestle was built the lights were too low to illuminate these rooms. Boylston Street was constructed at this point with a reserve space in the middle, between two driveways, one on the northerly and the other on the southerly side of the street. The railway tracks and the trestle were constructed in this reserved space, and, after the construction of the trestle, it was impossible for a team to pass from the south roadway to the north roadway near the petitioner's house. The cars ran very fast over the trestle. When going up the trestle they seemed to be moving as fast as possible when their speed was fifteen or eighteen miles an hour. In going down the trestle they sometimes went as fast as twenty-five to thirty miles an hour. They made a great noise, and when going down the trestle the gong was clanged to warn travellers. The disturbance was such that it was almost impossible to get sleep in the petitioner's house before eleven or twelve o'clock at night.

Proceedings were begun in 1900 for a separation of the grades of the Boston and Albany Railroad and the street, and the work whereby this grade crossing was abolished was completed in August, 1906. The trestle was taken down and removed in July, 1908.

The effect of the St. 1903, c. 163, as it was construed in *Lentell* v. *Boston & Worcester Street Railway*, 187 Mass. 445, was to leave the railway company liable to pay damages for the con-

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struction, maintenance and use of this trestle, if the street was thereby put to a use beyond that which was paid for under the general law, when the street was originally laid out. The declaration in § 3, that this should be deemed not to be an additional easement or servitude, was coupled with a provision for compensation to any person legally damaged in his property by the construction, maintenance or use of the trestle. This was equivalent to a statement that the Legislature did not assume to determine finally whether the street could be put to such a use without compensation to abutters.

The trestle, in its effect upon the street at this point, and upon the plaintiff's houses, was very similar to the elevated railways which have been built in large cities in recent years. In its effect upon the use of the street by travellers with horses, it was, in some respects, far more detrimental than an elevated railway in a crowded city, partly because the sights and sounds from cars of elevated railways in large cities are mingled with many other disturbing sights and sounds which make them less noticed by horses than would otherwise happen, and partly because the horses used in crowded parts of cities are accustomed to a great variety of disturbing conditions, while horses in suburban and rural regions are not familiar with such terrifying disturbances. By the St. 1894, c. 548, § 8, the elevated railway in Boston was declared to impose an additional servitude upon land taken for public streets, and a provision was made for the payment of damages accordingly. *Baker* v. *Boston Elevated Railway*, 183 Mass. 178.

The law in this Commonwealth is exceedingly liberal to the public, in its interpretation of the provisions under which streets and highways are laid out. The public easement acquired under such statutes "is held to include every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper in the use of a public street." *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.* 182 Mass. 397, 399. The doctrine has been stated and elaborated in many other cases. *White* v. *Blanchard Brothers Granite Co.* 178 Mass. 363. *Eustis* v. *Milton Street Railway*, 183 Mass. 586. *Howe* v. *West End Street Railway*, 167 Mass. 46. *Pierce* v. *Drew*, 136 Mass. 75. But the uses

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that may be made in the public interest, under a taking for a street, are limited by the decisions to those which are reasonable. In determining what is reasonable, not only the rights of the public as users of the streets in different ways are to be considered, but the rights of abutters as property owners along the line of the street are to be taken into account. When this is not definitely expressed in the cases, it is implied. In *Sears* v. *Crocker*, 184 Mass. 586, 588, it is definitely expressed as follows: "The public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters." In the laying out of streets under our general laws, while it has been assumed that they may be used in a variety of ways, for travel, transportation, transmission and communication, it has not been assumed that they can be put to uses that would throw a very great burden upon adjacent proprietors in the occupation or use of other property. The easement acquired by the public is only for uses that are reasonable in reference to their effect upon adjacent property, as well as their effect upon other kinds of public uses of the street. A use of the street which would constitute a grave private nuisance to property at the side of the street could not have been contemplated by the law as being acquired by a taking for a highway or street. As was pointed out in *Baker* v. *Boston Elevated Railway*, 183 Mass. 178, 183, the difference between disturbance which would constitute a nuisance as between private owners and that which would not has been treated by the courts of England as an important consideration, if not an absolute test, in deciding what shall be paid for by the corporation, acting under public authority. It is true that, in the exercise of the police power, the Legislature may authorize or limit the use of property within certain bounds, thus changing, to a certain extent, the law of nuisance, without taking property under the right of eminent domain. *Sawyer* v. *Davis*, 136 Mass. 239.

In the city of New York the streets are held by the government in fee as property, subject to a trust that they shall not be put to a use which is inconsistent with their use as streets, or

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destructive of the object for which they are held. It has been decided repeatedly that to permit the construction of an elevated railway in these streets by a private corporation, without compensation to the abutters, is a violation of this trust, and a taking of an easement belonging to them. *Story* v. *New York Elevated Railway*, 90 N. Y. 122. *Lahr* v. *Metropolitan Elevated Railway*, 104 N. Y. 268. *Kane* v. *New York Elevated Railway*, 125 N. Y. 164. *Lewis* v. *New York & Harlem Railroad*, 162 N. Y. 202. *Muhlker* v. *New York & Harlem Railroad*, 197 U. S. 544. The cases in which it is held that, under the law of New York, there is a difference between the rights of the public authorities to construct an elevated viaduct for general travel and the right of a corporation to construct an elevated railway for the convenience of passengers, under legislative permission, does not affect the authority of the cases above cited, as bearing upon the construction of elevated railways by railway corporations in this Commonwealth. See *Sauer* v. *New York*, 206 U. S. 536.

Upon the question whether an additional servitude is imposed, courts very generally have recognized a distinction between elevated railways and other uses of streets for travel. *Jones* v. *Erie & Wyoming Valley Railroad*, 151 Penn. St. 30. *Willamette Iron Works* v. *Oregon Railway*, 26 Ore. 224. *State* v. *Superior Court*, 26 Wash. 278. *Dairy* v. *Iowa Central Railway*, 113 Iowa, 716. *Farrar* v. *Midland Electric Railway*, 101 Mo. App. 140. *DeGeofroy* v. *Merchants Bridge Terminal Railway*, 179 Mo. 698. *Barnett* v. *Johnson*, 2 McCarter, 481.

We are of opinion that there were facts before the judge in the present case, which would warrant a finding that the trestle would have been a private nuisance of a grave character to the petitioner's estate, if it had not been authorized by the Legislature, and that its maintenance was a use of the street which would have been unreasonable, under the general taking, in the absence of statutory authority to provide for new and peculiar conditions. Upon such a finding, the right to construct and use the trestle would not be included in the easement acquired by the public when the street was laid out, and under the statute before us there would be a taking of the petitioner's property by right of eminent domain.

The fact that the damage was not permanent does not affect

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the petitioner's right to recover compensation for that which he suffered. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 587. *McKeon* v. *New York, New Haven, & Hartford Railroad*, 75 Conn. 343. *St. Louis, Jerseyville & Springfield Railroad* v. *Kirby*, 104 Ill. 345.

Judgment on the verdict.

W. D. Turner, (*S. S. FitzGerald* with him,) for the petitioner.

G. W. Cox, (*J. F. Bacon* with him,) for the respondent.

COMMONWEALTH *vs.* MIN SING & others.

Suffolk. March 24, 1909. — May 20, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Criminal, Exceptions, Charging jury. *Witness*, Impeachment of. *Pleading, Criminal*, Indictment. *Accessory.*

At the trial of an indictment for murder before two judges of the Superior Court, the counsel for the defendants made orally an offer of evidence which was excluded by the judges. The defendants' counsel indicated an intention to save an exception to the exclusion of the evidence, and the court said that which fairly implied that an exception had been saved. It was arranged that the defendants' counsel should put their offer of proof in writing and present it to the judges. On the morning of the next day of the trial such an offer in writing was presented to the judges, and was not referred to again by the judges or the counsel until the case had been given to the jury, when it was discovered that the judges understood that the arrangement for the presentation of the offer in writing was in order that they might consider it in writing instead of ruling upon the oral statement. The counsel for the defendant believed that the court had ruled and had excluded the evidence and believed that their exception to the ruling was recognized and had been saved to them. The judges refused to allow the exception, and, upon a petition to prove exceptions, a commissioner to whom the petition was referred found the facts above stated and also found "that the words of the court gave the counsel reasonable cause to believe that their right was saved to them." *Held*, that the exception should be allowed.

At the trial of an indictment for murder against a number of defendants, all of whom were foreigners of the same race, the defendants offered to prove that a person, who had assisted the police officers as an interpreter in their efforts to ascertain the facts and to arrest the guilty parties, had tried to induce certain four persons to give false testimony against the defendants and had paid to each of them a substantial sum of money upon his promise to give such false testimony, and also that a police officer, who helped to arrest some of the defendants and assisted in obtaining evidence of the facts communicated to the district attorney, was implicated in the effort to procure false testimony from

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some of the four persons. The evidence thus offered was excluded. None of the four persons, from whom it was alleged that the false testimony was sought, testified at the trial, and the evidence was not offered in contradiction of or to affect the credibility of any witness. *Held*, that the exclusion was proper; that there was no such legal identity or privity between the interpreter or the police officer and the Commonwealth as to make proof of such dishonest and criminal conduct on their part admissible to disparage the prosecution of the case.

At the trial of an indictment for murder against a number of defendants, where one of the witnesses for the government is a police officer who helped to arrest some of the defendants and assisted in obtaining evidence of the facts communicated to the district attorney, if evidence is offered to impeach his testimony, to the effect that he was implicated in an attempt to procure false testimony against the defendants, the evidence thus offered is admissible as affecting his credibility, but, if, in a case where such evidence was offered and excluded, it appears that the witness testified only as to undisputed matters and to nothing that tended to show guilt as to any of the defendants who excepted to the exclusion of the evidence, such an exception will not be sustained, because, if the jury had believed the evidence which the defendants offered and in consequence had given less credence to the statements of the witness, the result of the trial could not have been affected.

In a criminal trial, as in a civil one, it is within the discretion of the presiding judge or judges to refuse to permit a witness to be asked on his cross-examination a question which he already has answered twice to the same effect, especially where the question relates to an immaterial matter.

In an indictment for murder in the first degree the words "deliberately premeditated" are not necessary, a charge in the form prescribed by R. L. c. 218, § 67, being sufficient.

In an indictment for being accessory before the fact to a murder it is sufficient to follow the form prescribed by R. L. c. 218, § 67. If the defendant needs more definite information, § 89 of the same chapter gives him a right, on motion, to a bill of particulars.

In a criminal, as in a civil case, the presiding judge or judges properly may refuse to instruct the jury upon a particular part of the evidence, it not being the duty of a judge to deal with particular facts any further than seems to him necessary for the proper presentation of the issues in the case.

KNOWLTON, C. J. This case comes before us upon a petition to establish exceptions taken at the trial of the defendants upon an indictment for the murder of four men by shooting. The persons killed were all Chinese, and so are the defendants. Ten men were included as defendants in the indictment, of whom nine were charged with murder and one was charged with being an accessory to the murder before the fact. One of the defendants died during the trial, and the others were found guilty, eight of them of murder in the first degree, and one of being an accessory to the murder before the fact. Upon a motion for a new trial made in behalf of all the defendants the verdict was set aside as to four of them, on the ground that it

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was not sufficiently supported by the evidence. The other five are before us upon this petition to prove exceptions. As to one of those whose motion for a new trial was granted, the district attorney entered a *nolle prosequi* upon the indictment.

It was found by the commissioner and is conceded by the Commonwealth that all but one of the exceptions stated in the bill were properly saved, and that the petitioners, in good faith, made an honest effort to present truly the exceptions alleged to have been taken. The Commonwealth therefore agrees that all of the exceptions but this one are before us for consideration. The question in regard to this exception grew out of a misunderstanding between the presiding judges * and the attorneys for the defendants. The commissioner, in his report, has made very full and elaborate findings of fact, and has reported to the court the question of law whether, on his findings, the exception is proved.

There was an offer by the defendants to show that one Yee Wah, who had assisted the police officers as an interpreter in their efforts to ascertain the facts and to arrest the guilty parties, had endeavored to induce four different persons to give false testimony against the defendants, and had paid to three of these persons $50 each, and to the other $43, on his promise to give such testimony. Neither of these persons testified in the case at any stage of the proceedings. At the same time there was an offer of testimony tending to show that one Linton, a police officer who helped arrest some of the defendants, and who assisted in obtaining evidence of the facts and communicating it to the district attorney, was implicated in the effort to procure false testimony from some of these persons. This offer was made in a conference between counsel and the court, immediately after an objection by the Commonwealth to one of the questions put by the defendants' counsel. The defendants' attorneys urged the admissibility of the testimony, and the court said, in substance, "The evidence is not admissible." Mr. Bartlett, for the defendants, made a motion with his hand to the official stenographer, as a request to come to the bench where the conference was in progress. The court then inquired of Mr. Bartlett why he wanted the stenographer, and he replied

* *Pierce & Brown, JJ.*

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that he wanted him to take down and put upon the record what had been said, meaning the offer of proof and the action of the court thereon. The court replied, "You need not do that. Your rights are saved. You can trust the court. Put it in writing." The stenographer, who had risen from his seat, sat down again. It was arranged that the defendants' counsel should put their offer of proof in writing and present it to the judges. The witnesses referred to in the oral offer were excused from further attendance. This conference was on Friday, and the written offer of proof was presented to the judges in the morning of the following Monday, substantially as it had been stated orally, except that it did not contain a part of the evidence offered orally, which the judges said at the conference they would admit, and which subsequently was admitted in the form of a deposition. The writing was not shown to the district attorney, and no reference was afterwards made to the subject by the judges or the counsel until after the case had been given to the jury, when one of the defendants' attorneys said to the judges, "I suppose our rights are saved on our offer of evidence that the court rejected," and one of the judges replied that he did not understand that they had any rights, as the court had not been asked to rule upon the written offer. The commissioner found that the "defendants' counsel had made an oral offer of proof, . . . that all three of said counsel believed that the court had ruled and had excluded the evidence, that said counsel believed that their exception to the ruling was recognized and that their exception was saved to them." He also found "that the words of the court gave the counsel reasonable cause to believe that their right was saved to them." The subsequent difference of opinion arose from an understanding of the judges that the arrangement for the presentation of the offer in writing was in order that the judges might consider it as it would appear in writing, instead of ruling upon the oral statement; while the counsel understood it to be that the matters might be shown in a more satisfactory form than they had taken in the discussion which had been going on during the conference, and that the offer drawn by counsel might take the place of a stenographer's report of what had been offered and passed upon at the conference.

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Upon the findings of the commissioner it appears that the defendants' counsel indicated an intention to save an exception to the supposed ruling, and that the court said that which fairly implied that an exception had been saved. In determining the legal effect of action between parties, the reasonable interpretation of what is said or done is controlling. On the evidence, we are of opinion that the exception was legally saved. Were it not for the arrangement to have the offer put in writing, this would be plain. The judges' understanding that this formal writing was to be treated as a presentation of the offer *de novo*, for future action, does not appear to have been so stated to the counsel as to be understood by them, or to deprive them of the exception which they supposed and had reason to suppose had been saved. See *Clemens Electric Manuf. Co.* v. *Walton*, 173 Mass. 286; *Thwing* v. *Clifford*, 136 Mass. 482; *Kenny* v. *Ipswich*, 178 Mass. 368. We shall, therefore, consider the questions of law that are raised by the bill of exceptions.

The offer of evidence was founded on the familiar rule that such dishonest and criminal conduct of a party in the preparation or trial of a case is in the nature of an admission, implied from his conduct, that his claim is false and unjust. *Egan* v. *Bowker*, 5 Allen, 449. *Hastings* v. *Stetson*, 130 Mass. 76. *Simes* v. *Rockwell*, 156 Mass. 372, 374. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, 103.

Where the person sought to be bribed does not testify, there is not such a probability that the influence attempted to be exercised upon him has been exercised upon other witnesses, as to make the attempt competent, as indicating that the other witnesses have testified falsely. But such conduct of a party implies a consciousness that his case cannot rest upon its merits, and is in the nature of an admission that he is in the wrong in his contention before the court. The principle and the rule founded upon it are applicable to conduct of a defendant in a criminal case, as well as to that of a party in a civil suit. *Commonwealth* v. *Wallace*, 123 Mass. 400. *Commonwealth* v. *Webster*, 5 Cush. 295, 316. *Commonwealth* v. *Sullivan*, 156 Mass. 487. *Allen* v. *United States*, 164 U. S. 492. Of course, if the person who seeks to procure perjured testimony in a trial is himself a witness testifying as to matters in dispute, his misconduct and manifest

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bias may be shown to affect his credibility. If it is conceivable that a prosecuting officer, legally representing the Commonwealth, might be guilty of such misconduct, the question whether his wrong could be shown as an admission affecting the Commonwealth is one that has not been decided in any of the cases cited in the argument, nor in any that we have discovered in our independent investigation. There are numerous cases in which, when a party instituting and promoting a criminal prosecution was himself a witness and attempted to obtain false testimony from others, or otherwise to present the case unfairly, his misconduct has been held competent to affect his credibility. If we assume without deciding that such an attempt on the part of an official public prosecutor, representing the Commonwealth in the trial of a criminal case, might be proved to affect the rights of the public in their interest to convict and punish the guilty, it does not follow that an act of one merely assisting in ascertaining facts, or performing official duties as a sheriff or constable or police officer in the detection of criminals, can be shown as an admission of the Commonwealth. Plainly, the declarations of such an officer would not be competent evidence against the State. The reasoning applied to the declarations of the victim of a murder, offered as evidence in the trial of the murderer, is equally applicable to such a case. In *Commonwealth* v. *Densmore*, 12 Allen, 535, 538, the court said: "We do not see that the deceased stood in any such relation towards the Commonwealth as to render his declarations admissible as evidence. It cannot be properly said that in the prosecution of offences, *mala in se*, the Commonwealth asserts a private right or maintains an individual interest, in any such sense as to be affected or bound by hearsay statements of those who may have been the victims or objects of a criminal act on their property or person. There is no such legal identity or privity between them and the Commonwealth as to render their statements admissible in behalf of those who are charged with the commission of a crime." This is equally true of policemen and other similar officers who are performing official duties in ascertaining facts and bringing them to the attention of the public prosecutor who officially represents the people in the trial of persons accused.

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In all cases that have come to our attention, where the attempt has been to show such misconduct of some one other than the party to the suit, the question has been whether it was shown, by fair inference or otherwise, that the misconduct was authorized or ratified by the party himself. In some of the cases, nothing less than clear proof of authority by direct evidence is permitted. In *Nowack* v. *Metropolitan Street Railway*, 166 N. Y. 433, where a person was given full authority in the preparation of evidence for the trial of a case in which a corporation was a party, it was decided by a majority of four judges to three, that his representation of the corporation in that business was so complete that his wrong might be treated as an act of the corporation, which might be used against it as an indication that its cause was unjust. This case is the most favorable to the contention of the present defendants of any that has come to our knowledge, but it differs widely from the case at bar. In the first place, it was a civil suit involving nothing but private rights, in regard to which the parties could act independently with an unquestioned right of control. The person who procured the evidence was acting by direct appointment as an agent and personal representative of a private corporation. In the case at bar, the police officer, Linton, was merely performing his official duties in a department which gives him no jurisdiction to represent the Commonwealth in determining what shall be done or what shall be left undone at the trial of an accused person. That the prosecuting officers had any knowledge or suspicion of an attempt to procure false testimony is not suggested or suspected by the counsel for the defendants. Yee Wah, to whose conduct nearly all of the excluded testimony was directed, was not even a police officer. He was merely used as an assistant and interpreter by police officers in their investigations. There is high authority, as well as sound principle, against allowing a public prosecution to be prejudiced by the words or acts of persons having no relation to the case, other than in the performance of their duties as police officers in arresting suspected persons and endeavoring to ascertain facts. *Commonwealth* v. *Ryan*, 134 Mass. 223. *The Queen's case*, 2 B. & B. 282, 302. Wigmore on Evidence, § 280, and cases cited in note.

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We come now to the effect of such misconduct when the person guilty of it is a witness in the case. Plainly, it may be proved to show his bias and affect his credibility. Most of the reported cases are of this kind. In the conference between the counsel and the court, the excluded testimony was not offered in terms for this purpose. It appears by the bill of exceptions that, after a statement of most of the offered testimony, "the court insisted that this was not in contradiction of any testimony that was in the case. The defense replied that it was not offered for that purpose or with that end in view. It was offered on the broad ground that any attempt on the part of any person connected with either party to a suit, to procure false testimony, made such an attempt admissible in evidence, and urged that sufficient evidence had been introduced that Yee Wah was so connected with the government as to make his actions proper matter for investigation by the jury. . . . Mr. Woodman (the junior counsel for the defendants) suggested that Linton had been a witness, but Justice Pierce replied, 'that the question is much broader than that.'" Yee Wah, whose alleged conduct was the principal subject of the discussion, was at no time a witness, and it was not suggested that Linton had testified as to any facts in dispute, nor argued that the evidence was competent to affect his credibility as a witness. It is a familiar rule that where evidence is offered for a specific purpose and is rightly excluded upon that offer, it is not open to the party to contend that the evidence should have been admitted for another purpose. *Brown* v. *Leach*, 107 Mass. 364. *Hathaway* v. *Tinkham*, 148 Mass. 85. *Britton* v. *Worcester*, 123 Mass. 309.

It was said by the judges at the conference that the testimony of Sachs, which had a tendency to show that the witness Feeney had been influenced by Yee Wah, might be admitted as bearing upon Feeney's statements. It seems probable from the bill of exceptions that the excluded testimony was not offered for the purpose of affecting the credibility of Linton as a witness; but only upon the ground then urged in the argument. We are inclined, however, *in favorem vitæ*, to resolve the doubt on this point in favor of the defendants, and to consider the testimony as if offered on all grounds. So considered, it well might have been admitted, since Linton was called as a witness. But it

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does not follow that the exceptions must be sustained. We must inquire whether the bill of exceptions shows that the defendants now before the court were prejudiced by the exclusion of the evidence. This depends upon whether the testimony of Linton was important on disputed, material points, affecting the excepting defendants. Unless his testimony was material, they would not have been helped by the admission of other testimony affecting his credibility. Except a brief statement in regard to one of the defendants who is not a party to the proceedings before this court, to which we will refer hereafter, the only testimony that Linton gave, as stated in the bill of exceptions, is as follows: "He testified that at about a quarter past eight, on the night of August second, he was told to go down to Chinatown by his captain, and from that time had been in charge of the police activities of the case. During the services which he rendered, he arrested Hom Woon with one Hart, another police officer; Wong Duck with Ou Tong, Soo Hoo Lee and Moy Mow; Wong How and Warry Charles with the same Chinaman and Yee Jung with a Chinaman named Gee Yung. That the three Chinamen first named accompanied him in his search for different Chinamen implicated in the shooting, and he visited places where these men told him to go and look; that he relied upon them in going for these different people and getting information from them. He also testified that he had received certain bullets and pieces of lead, which were introduced as exhibits, from Moy Sing, Moy Wing, Lee Fong and other Chinamen and, with the exceptions of the weapons and clothing, had received and retained all the exhibits in the case." So far as appears, these matters were wholly immaterial to any disputed point in the case. On the question whether these defendants killed the murdered men, it was of no consequence that he was told to go to Chinatown and that he had charge of the police activities in the case. On this question, it was of no consequence that he was the officer who made the arrest of some of the defendants and that three Chinamen, none of whom were defendants, accompanied him in searching for different Chinamen, and that he visited places where they told him to go and look. There is nothing in any of these statements that tends to show guilt on the part of any of the defendants. It does not

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appear that they told him anything tending to show guilty knowledge on their part, or that he discovered anything founded on their statements, or that made these statements or his discoveries of any consequence as indicating the guilt of any of them, either circumstantially or otherwise. Nor is the fact that he received certain bullets and pieces of lead from certain Chinamen other than the defendants material. It was an undisputed fact that many shots were fired in very quick succession, the government witnesses estimating that there were as many as forty or fifty, and there was uncontradicted testimony that many bullets and bullet marks were found near where the shooting occurred. There was no evidence in the case, nor did the Commonwealth contend, that any particular bullet fired by any one of the defendants, who the testimony showed fired at Chin Let, Chin Min Quin and Wong Shue Chung, was the particular bullet that killed any of these men. He did not testify to anything in regard to the weapons and clothing, except that he did not retain them in his custody, and there is nothing to show what other exhibits there were, if any, besides the bullets and pieces of lead. If there was any materiality in any part of this testimony, it bore only upon matters that were overwhelmingly proved by other witnesses and were not in dispute. If all of this testimony were stricken out, it does not appear that the weight of the evidence against the defendants would be affected in the slightest degree. His credibility as a witness, testifying to these matters, is not shown to have been of any weight in establishing facts on which the Commonwealth relied for the conviction of the defendants.

The burden is upon the defendants to show that they were injured by the ruling excluding the testimony; that is, that the excluded testimony, if believed by the jury, might have changed the result as to them. They have only shown that if the evidence had been admitted, the jury might have given less credence to these statements of this witness; but these statements were only of facts which were wholly immaterial or not in dispute. The giving of a greater or less degree of credence to the statements could not have affected the result, and the defendants were not harmed by the ruling.

Linton testified to one other matter which had no bearing

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upon the conviction of any of the defendants now before this court. Wong Duck was arrested in Quincy, and Linton was one of three officers who arrested him. "Linton testified concerning this same arrest that the interior was lighted by gas, and that when he entered at the front door he called Wong Duck into a sleeping room from the kitchen at the rear, and told him to dress. That thereupon Wong Duck took from a pasteboard box upon a stand in that room a revolver, and passed it to his employer, one Jung Bak Goon, at the same time saying something in Chinese; that the latter took the revolver and claimed that it was his, and said that the chief of police, one Burrill, who lived across the street from the laundry where the arrest was being made, had given him authority and license to keep it." This testimony was of no importance except in reference to the charge against Wong Duck. A new trial has been granted to Wong Duck, and he is not a party to the proceedings in this court. The excepting defendants were not affected by this testimony, for there is no evidence of any such relation between them and Wong Duck as to make his words or conduct at the time of his arrest, or Linton's account of his words or conduct, of any materiality to the question whether they were innocent or guilty. The excepting defendants, therefore, were not harmed by the exclusion of the offered testimony in reference to the credibility of Linton in this part of his statement.

The defendants excepted to the refusal of the judges to permit a witness to be asked this question in cross-examination: "Or did Soo Hoo Wing say to you at that time, 'it didn't make any difference whether he was or not; you identify him'?" It was in the discretion of the court to say how far the counsel should be permitted to go in cross-examination. The witness had just made an answer which included the answer to this question. In the answer to the second question before, he had said that Soo Hoo Wing did not speak at all on that occasion. His answer to the last question was confirmatory of the former answer. There was no error of law in excluding the question. Besides, the subject of the inquiry was his identification of Dong Bok Ling, one of the defendants who has been granted a new trial, and all the testimony on the subject has become immaterial.

The motion to quash was rightly overruled. The words,

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"deliberately premeditated," are not necessary to a charge of murder, and a charge in the statutory form without these words is a charge of murder in the first degree. R. L. c. 218, §§ 38, 67. *Commonwealth* v. *Snell*, 189 Mass. 12. *Commonwealth* v. *Holmes*, 157 Mass. 233. *Commonwealth* v. *Best*, 180 Mass. 492. *Commonwealth* v. *Gilbert*, 165 Mass. 45, 53. If the pleader desires to charge murder only in the second degree, the statute provides a way in which he may do so. R. L. c. 218, § 67. Under a charge of murder in the first degree, the proof may show that it is in that degree for either of the causes stated in the statute, or may show that it is in the second degree. R. L. c. 207, § 1.

The charge against Warry Charles as accessory before the fact followed the statute and was sufficient. R. L. c. 218, § 67. If more definite information was needed by the defendant, he was entitled, upon motion, to a bill of particulars. R. L. c. 218, § 39.

The judges were not called upon to give the fourth instruction requested,* in the terms in which it was presented. All but the last clause of it was given in substance. The suggestion that in considering the explanation of their flight, given by the defendants, the jury should consider whether the defendants, by reason of their extraction and teaching, were accustomed to act from different motives from those which prompt the English-speaking race, was a request to charge upon a particular part of the evidence bearing upon the explanation, and it was not the duty of the judges to deal with particular facts any further than seemed to them necessary properly to present the issues in the case.

Exceptions overruled.

C. W. Bartlett & H. H. Pratt, (*J. C. Woodman* with them,) for the defendants.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth.

* The fourth instruction requested was as follows: "If the jury shall find that any of the defendants left Boston, or were apprehended in flight, after the shooting, this fact shall not be taken against them, if the jury believe the explanation of such flight offered by the defendants alleged to have fled; and in weighing the truth or falsity of such explanation, the jury may consider whether the defendants offering it are not, by reason of their extraction and teaching, accustomed to act from different motives than those which prompt the English-speaking race."

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JOHN K. BERRY, trustee, *vs.* HARRISON DUNHAM, executor, & others.

BENTLEY W. WARREN & another, trustees, *vs.* RECTOR AND BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA & others.

Suffolk. January 22, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Trust, Creation, Spendthrift trust. *Devise and Legacy.*

A father made a deposit with the Massachusetts Hospital Life Insurance Company of $25,000 in trust for the benefit of his son H. By a contract in writing between the donor and that company it was provided that during the life of H. the company should pay the income to the donor, for his use during his life, and at his death should pay it to the donor's brother for the benefit of H. "payable to him at his discretion, in such sums as he may think judicious." At the death of H. the trust fund was to be paid to the donor or his executors or administrators. The contract further provided as follows: "If the grantees of this annuity shall at any time become bankrupt or insolvent, or if their interest under this annuity shall be attached or seized on any process of law or in equity, their right to receive payment of the annuity in money shall forthwith cease, and thereafter, the company instead of paying said annuity in money to said grantees, shall retain the amount in their hands, and thereafter" shall apply it as directed. The testator died before his son H. The fifth paragraph of his will was as follows: "I give and bequeath to each of my children living at my decease the sum of $1,000, which is to be held in trust by my executors and to be paid or to be expended by them for the support of the children respectively during the year after my decease; and it is to be paid or expended in such sums and in such manner as may seem to my executors judicious." The sixth paragraph of his will was as follows: "Having invested in the Massachusetts Hospital Life Insurance Company . . . a sum for the benefit of each of my children, the income of which is for their support respectively; in case the income does not amount annually to $1,200 for each respectively, I direct my executors to supply any deficiency from that sum from the income of my other estate — so that each may have $1,200 for their support. And the $1,000 to be used for my son H. under the fifth item of this will, with the above provision, is to be in full of his portion of my estate, I being convinced that $1,200 per annum for his support will be sufficient for all his necessary wants and that more would be injurious." *Held*, that the contract and the sixth paragraph of the will must be construed together, that they created a trust to be administered wholly by the trustee under the contract, and that the expenses of administering the trust were to be deducted from the income in estimating the deficiency which must be supplied by the executors of the will to the trustee under the contract to give to H. an income of $1,200 a year. *Held, also*, that under the terms of the trust H. had no power to alienate the income which was payable to him at the discretion of the trustee, having no right to dispose of it until actually in his possession.

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BILL IN EQUITY, filed in the Supreme Judicial Court, as amended, on July 13, 1906, by the trustee under a contract made on February 15, 1879, by the Massachusetts Hospital Life Insurance Company with Arthur W. Austin, late of Milton, for the benefit of Henry W. Austin, his son, praying for instructions as to his duties as such trustee under the contract in connection with the sixth article of the will of Arthur W. Austin proved on September 3, 1884.

ALSO ANOTHER BILL IN EQUITY, filed in the Supreme Judicial Court on October 4, 1907, by the trustees under the will of Arthur W. Austin, praying for instructions.

The cases were referred to William H. H. Emmons, Esquire, as master, who filed a report. Later the cases came on to be heard by *Morton*, J., who reserved them upon the master's report, the exceptions thereto in each case and so much of the pleadings as might be material, for determination by the full court, such decree to be entered as law and justice might require.

The contract above referred to was as follows:

"Annuity in Trust.

"The Massachusetts Hospital Life Insurance Company in consideration of the principal sum of twenty-five thousand dollars and cents, received by them of Arthur W. Austin for the benefit of his son Henry W. Austin of Milton in the State of Massachusetts in trust as heretofore mentioned, the receipt whereof is hereby acknowledged, do hereby promise and agree to and with the said Arthur W. Austin, his executors and administrators, that the said company shall and will invest the same in bank or other stock, or in real estate, or place the same out at interest on mortgage or other security at the discretion of the directors; and that the said company shall and will yearly and every year during the natural life of said Henry, pay or cause to be paid, to said Arthur for his use during his life, and at his decease to be paid to Henry D. Austin, brother of said Arthur if living, for the benefit of said Henry, payable to him at his discretion, in such sums as he may think judicious. If said Henry D. shall have deceased the actuary of said company for the time being to appoint some trustworthy person to act, in yearly payments on the first day of January in each and every year during the natural life of said Henry, (unless added

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to the principal sum as provided below) the first payment to be made on the first day of January next the same rate of interest on said principal sum as the said company shall actually make and receive upon their capital stock paid in, and the other property in their possession, including real estate, stocks of the United States, bank or other stocks, notes, bonds, and mortgages, after deducting all necessary expenses and charges (excepting office rent and the salaries of the company's officers and servants) and all actual losses by bad debts or otherwise, not arising from the actual fault of the company or their servants, and also half of one per centum per annum for the expenses of their office, and the labor, trouble and responsibility of investing, taking care of, and managing said Trust property. The said principal sum received of said Arthur to be invested and managed, and the amount of the income thereof to be estimated, ascertained and determined by the directors of said company, in the way and manner provided in the extract from the article on Annuities in Trust, printed at the bottom. Interest to commence August 15, 1879.

"If the grantees of this annuity shall at any time become bankrupt or insolvent, or if their interest under this annuity shall be attached or seized on any process of law or in equity, their right to receive payment of the annuity in money shall forthwith cease, and thereafter, the company instead of paying said annuity in money to said grantees, shall retain the amount in their hands, and thereafter, while the money remains in the hands of this company, shall apply and expend the same, as it shall fall due, in such way and manner as said Arthur, his executors or administrators shall in writing direct and appoint; or in default of such directions and appointment, the directors of said company shall, at their discretion, either appropriate the same for the use and benefit of any child or children of said grantees, in such way and manner as they may think expedient, or shall add the income thereof to the principal sum to increase the same, to be disposed of in like manner as is provided in relation to said principal sum on the death of said grantees, or shall apply or expend the amount of the income from time to time as said directors may deem to be most in accordance with the true intent and meaning of this contract.

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"And the said company, for the consideration aforesaid, further promise and agree that, in sixty days after the decease of the said Henry W. Austin they will assign, transfer, and pay the amount of the aforesaid principal sum (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said company or their servants) and all interest then due thereon at the time of said death, in real estate, stocks, notes, bonds, and mortgages, belonging to said company, all, any or either of them, at the pleasure and discretion of the directors, at the prices at which the same respectively shall stand charged in the books of the company at the decease of said Henry W. in the way and manner provided in said extract from said article, to said Arthur W. Austin, his executors or administrators.

"In witness whereof, the said Massachusetts Hospital Life Insurance Company have, by their actuary and secretary duly empowered for this purpose, signed and delivered this contract, this fifteenth day of February, one thousand eight hundred and seventy-nine.

"J. C. Braman, Secretary, Samuel C. Cobb, Actuary."

Henry D. Austin died before Arthur W. Austin, and, upon the decease of the latter, one James W. Austin was appointed and served as trustee, who, being deceased, was succeeded by one Walter Austin, who was succeeded by the plaintiff in the first case.

The fifth and sixth articles of the will of Arthur W. Austin were as follows:

"5th. I hereby give and bequeath to each of my children living at my decease the sum of One Thousand Dollars, which is to be held in trust by my Executors and to be paid or to be expended by them for the support of the children respectively during the year after my decease, and it is to be paid or expended in such sums and in such manner as may seem to my Executors judicious.

"6th. Having invested in the Massachusetts Hospital Life Insurance Company of which Samuel C. Cobb is actuary on the 15th of February, 1879, a sum for the benefit of each of my chil-

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dren, the income of which is for their support respectively, in case the income does not amount annually to $1,200 for each respectively, I direct my Executors to supply any deficiency from that sum, from the income of my other estate, so that each may have $1,200 per annum for their support. And the one thousand dollars to be used for my son Henry W. Austin under the fifth item of this Will with the above provision is to be in full of his portion of my estate, I being convinced that $1,200 per annum for his support will be sufficient for all his necessary wants, and that more would be injurious."

On February 7, 1903, Henry W. Austin executed an instrument purporting to assign and transfer to two persons named, to be divided between them proportionally, " all income and moneys hereafter payable to me as beneficiary under terms of the will of my late father, Arthur W. Austin, duly probated in the Probate Court, Suffolk County, Massachusetts, whereof Walter Austin is now trustee; To have and to hold said income and moneys to their own use and benefit until said sum and my notes to them with interest be duly paid." The assignment was made to secure the repayment of certain sums of money lent and to be lent to the assignor by the assignees and the payment of certain notes given by him to them.

J. K. Berry, for himself as trustee, read the papers in the first case.

J. K. Berry & E. C. Upton, for Berry, trustee, as a defendant in the second case, submitted a brief.

C. R. Lamson, for Bentley W. Warren and William Endicott, Jr., the trustees under the will of Arthur W. Austin, as defendants in the first case and as the plaintiffs in the second case, made a statement of the second case in which such trustees sought for instructions.

P. H. Kelley, for Henry W. Austin.

H. Dunham, for himself, as executor of the will of Lorenzo F. Papanti, and Leroy J. Ellis, claiming under the assignment from Henry W. Austin.

H. Winn, for George F. Washburn and Lindsay Swift, holders of drafts on Berry, trustee, given by Henry W. Austin.

H. J. Coolidge, for the University of Virginia, which was the final residuary legatee, and to which Mary Austin Carroll, who

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was the residuary annuitant, had assigned all her share in the residuary income above a certain amount.

The Massachusetts Hospital Life Insurance Company appeared in the case as a stakeholder, but was not represented at the argument.

BRALEY, J. Having previously purchased an annuity for the benefit of his son, Henry W. Austin, if he survived him, the testator when he came to dispose of his estate further provided, in the sixth clause of his will, that, if the income from the annuity did not annually produce the sum of $1,200, the deficiency should be supplied by the executors.

By the contract, to which express reference is made in this clause, the income was to be held in trust until its termination by the death of Henry, to whom no part of the capital was given. *Sawyer* v. *Cook*, 188 Mass. 163, 166. If instead of using the scheme of administration already perfected, the testator had intended that the deficiency, if any, should be paid directly to his son, he would have so provided. But, having received the income during his life, he must have known the average return, and with this knowledge directed that the difference between the income and the maximum amount, which might be increased under the first codicil, if he survived his sister Mary, should be supplied out of his remaining estate. The income had been put in a trust which would not terminate until the death of the surviving annuitant, and, when he made this further testamentary provision, the testator manifestly intended that the entire amount without division should be administered by the trustee, even if his services might not be gratuitous, rather than a part by him and the remainder, whether small or large, directly paid over to the beneficiary. *Sells* v. *Delgado*, 186 Mass. 25.

The amount established by the will is the net sum to be furnished, and all necessary expenses of the administration of the trust as one fund are to be taken out of the income, and the difference between the balance and the annual provision for the son's support measures the deficiency which the executors were directed to supply to the trustee. Under the residuary clause, this duty now devolves upon the trustees, and the income of the residuary legatee for life, or the University of Virginia, which by assignment from her has become vested with a partial

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interest therein, is subject to this reduction. *Endicott* v. *University of Virginia*, 182 Mass. 156.

But, if what we have said disposes of the exceptions of this defendant to the master's report as to whether a trust was established, whether the fund was to be treated as entire and whether the expenses of its administration were to be included in estimating the deficiency with which the residue was chargeable, there remains for decision the principal question, which is raised by the exceptions of the other defendants, whether the fund was alienable or subject to attachment for the debts of Henry W. Austin.

It may be said at the beginning, that this question was not decided by *Endicott* v. *University of Virginia*, 182 Mass. 156, as it was not referred to or involved in that decision. If, as argued by counsel for the creditors who claim under assignments or orders, the contract for the annuity was entered into and the will published before the decision in *Broadway National Bank* v. *Adams*, 133 Mass. 170, adjudicating that the founder of a trust may secure the income to the beneficiary without the power of alienation by him or being subject to attachment by his creditors, the decisions in *Hall* v. *Williams*, 120 Mass. 344, and *Minot* v. *Tappan*, 127 Mass. 333, 336, which antedated both instruments, had clearly recognized this right. The construction to be given then, as to whether there was an absolute gift of income or only a qualified interest not within the control of the beneficiary, well may rest on the law of those decisions as interpreted in the leading case. *Dana* v. *Dana*, 185 Mass. 156, 158. No set form of words is necessary to create such a trust, but the intention of the testator, or settlor, when ascertained must control. In the present case this is to be gathered from the contract and the will construed as one instrument. *Thayer* v. *Wellington*, 9 Allen, 283, 292. *Newton* v. *Seaman's Friend Society*, 130 Mass. 91, 93. A recurrence to the second paragraph of the contract shows that the donor did not intend that attaching creditors or an assignee in bankruptcy or insolvency should reach or succeed to the income, for it is expressly stated that upon the happening of either event the right of the beneficiary who is within the designation of "grantees" to receive the payment of the annuity should forthwith cease. If with

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this indication of the testator's thought we now recur to the will, the sixth clause speaks of the annuity previously purchased for each of his children, "the income of which is for their support respectively," and the deficiency is provided for, "so that each may have" a maximum fixed sum "for their support." The testator, as to his son Henry, adds, however, that this yearly allowance "for his support will be sufficient for all his necessary wants, and that more would be injurious." The habits of the son during the father's life do not appear, but, when the size of the estate disposed of is considered with the liberal provisions made for the other children, one of two conclusions is suggested, either an unjust discrimination was intentionally made, of which there is no evidence, or from the general tone of the expressions used, the improvidence of the son had become such that the testator believed his further bounty, if conferred, would be either squandered or lost through misfortune. In the light of the will as reflecting his continued purpose to secure the means of support for his son, the first paragraph of the contract should now be read. It is carefully phrased, and provides that upon the donor's death the accrued income is not to be paid directly to the annuitant by the company but is to be turned over to a trustee for his benefit, "payable to him at his discretion, in such sums as he may think judicious." The testator intended his son should not have the power to alienate or anticipate the income, and thus probably be left without any means of support as the income accrued, and to carry out this purpose substituted the instrumentality of a trustee, which otherwise would have been unnecessary, as the administration by the company would have been sufficient. By this construction, all the provisions of the contract and the will are given a consistent effect, and it is only when the money is actually received by him that his right to dispose of it begins, for, until then, the trustee in the exercise of a sound discretion can refuse to pay over anything but may apply the income as he deems advisable for the benefit of Henry. *Wemyss* v. *White*, 159 Mass. 484, 486. *Nickerson* v. *Van Horn*, 181 Mass. 562, 565, and cases cited.

The beneficiary having no power to alienate the income, his assignment of it or drafts and orders drawn by him on the trustee in payment of debts, are unenforceable, and the excep-

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tions of these defendants to the master's report also must be overruled, and the report confirmed.

It further follows that the income in the possession of the company, which has accrued pending the litigation, and any deficiency remaining to be supplied by the trustees under the will, are payable to the trustee, Berry, by whom the entire amount is to be administered. *Sells* v. *Delgado, ubi supra.*

Decree accordingly.

HARRY C. WIGGINS *vs.* FREDERICK J. BRAND.

Suffolk. January 26, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Partnership, Accounting between partners, Dissolution. *Interest. Equity Pleading and Practice*, Decree.

Where a partnership has sold all its business excepting its bills receivable, but the partnership has not been dissolved, and one of the partners voluntarily takes upon himself the duty of liquidation without there having been any express agreement between the partners that he should be paid for his services, no allowance for his time and services in the liquidation should be given to him in his final accounting with his partner.

Where two partners sell all the partnership business except the bills receivable and the purchaser does not assume active control immediately, but one of the partners, who voluntarily had taken upon himself the liquidation of the partnership affairs, the partnership not having been dissolved, acts as manager for the purchaser and continues to carry on the business under the partnership name and to use the funds of the partnership for that purpose, and in so doing the purchaser becomes indebted to the partnership in a certain amount, the liquidating partner may be held accountable to his partner for such partner's proportional share of the amount of such debt of the purchaser.

Where one of two partners voluntarily has assumed the duty of liquidating its affairs, in stating his account with his partner on dissolution of the partnership, he must show that all money which he has received on behalf of the firm either is available for distribution or has been disbursed lawfully, and, if he does not explain an expenditure or show that his partner assented to its having been charged to the profit and loss account, he properly may be held to owe his partner one half of the amount of such expenditure.

In a suit in equity between two partners for an accounting, it appeared that the defendant voluntarily had taken upon himself the duty of liquidating the affairs of the partnership, that three and a half years was a reasonable time for the complete performance of that duty, and that after that time the defendant used the firm funds for his own purposes. *Held*, that it was proper to charge the de-

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fendant with interest on the principal sum which was found due to the plaintiff from the time when the defendant should fully have performed his duties.

Where in a suit in equity between partners who had been associated together by oral agreement with no definite time stated for termination of the partnership, a final decree has been entered, overruling the defendant's exceptions to a report of a master stating the account but failing to decree a dissolution, and the defendant has appealed, it is proper for this court to direct that the decree be so modified as to include an order for a dissolution, and that, so modified, it be affirmed.

BILL IN EQUITY, filed in the Superior Court for the county of Suffolk on December 8, 1904, alleging that the plaintiff and the defendant had been partners, that the business of the partnership had been sold and that thereafter the defendant had had charge of the liquidating of the firm accounts, and on account of such liquidation owed certain sums to the plaintiff; and praying that the defendant be ordered to account with the plaintiff, and "that the defendant be required to immediately wind up the affairs of the company, dissolve the same in due form, and pay over to the plaintiff the amount found due on said accounting," and for general relief.

The case was referred to Wellington Wells, Esquire, as master. In his report, beside the facts stated in the opinion, he found in substance the following:

Previous to January 1, 1899, the plaintiff and the defendant had been engaged in business as partners under the firm name of the Boston Felting Company. There was an accounting between them in December, 1895. On January 1, 1899, they sold out the partnership business to the American Felt Company, but reserved to themselves the accounts receivable and assumed bills payable up to that time. After the business was sold out, the plaintiff and the defendant were both employed by the American Felt Company.

The defendant's continued relations to the partnership are stated by the master in the following terms: "I find upon all the evidence that the defendant was the liquidating partner of the business of the Boston Felting Company; that there was no express agreement at the time the partnership was formed, or subsequent thereto, that the defendant should receive compensation for his services in settling the affairs of the partnership; that the defendant rendered these services with the knowledge

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and consent of the plaintiff, and that these services were equally beneficial to the plaintiff and the defendant." Consequently, the master disallowed a claim of the defendant for $1,787.63 for his own time and personal services in litigation relating to a claim of $13,000 of the partnership against a debtor whose property was in the hands of a receiver. He also found that the value of such time and services was $600.

The facts with regard to the claim against the American Felt Company are stated in the opinion.

The master also found: "An item for $1,229.05 on the exchange account, I find was charged off to profit and loss by the bookkeeper at the direction of the defendant while she was working on the new account. By this account it appeared that a check of the firm had been drawn, payable to one Hattie I. Babcock, for the sum of $1,250 and dated June 10, 1899. This check was not produced in evidence, and I find it has been destroyed. The defendant testified that all the checks of the partnership were destroyed some time shortly after the business was sold out to the American Felt Company. The plaintiff testified that he had never destroyed any of the checks or authorized their destruction by any one else, or had known of their destruction until the hearing of this case. I find that the stub in the check-book corresponding to the number of the destroyed check bore this entry in the handwriting of . . . the bookkeeper, '$1,250.00 June 10th, 1899, Hattie I. Babcock Exchange for cash $1,250.00.' No evidence was introduced in regard to the indorsements on said check. I find that the defendant almost invariably signed the firm check, except on one occasion when the plaintiff signed the firm's check payable to one Woodruff; that when the defendant was to be out of town he generally left some firm checks signed in blank which were later filled out, as occasion required, by the bookkeeper, and sometimes under the direction of the plaintiff if he was in the office. The bookkeepers testified that they had no recollection of this check or the circumstance under which it was given.

"I find that the defendant was the attorney in fact for the executors under the will of one Chapin which was probated in Florida. Under the provisions of this will, one Clarissa Babcock, who was the sister of the testator, was the beneficiary for

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life of the income of a quarter of the estate, with the remainder over to one Hattie Babcock, who was her daughter. The defendant testified that he did not recall any Hattie I. Babcock. The books of the firm on the personal account of the defendant showed that on June 10, 1899, he paid to one Hattie I. Babcock the sum of $31.25.

"I find that the defendant swore to an account of the said estate as of June, 1898, which account shows a distribution of $1,250 to one Clara Babcock who I find from the evidence was the same person as the Clarissa Babcock named in the will.

"After the plaintiff had introduced evidence of the probating of said estate, the defendant testified that he inquired at home after giving his previous testimony, and his wife informed him that she had a relative by the name of Hattie I. Babcock who was a niece of the testator named in said will, and he then testified that this information did not refresh his recollection in any way in regard to the $1,250 check.

"The plaintiff testified that he never knew a Hattie I. Babcock and had no knowledge of this check until he heard the evidence at this trial.

"I find that . . . in June, 1899, the Boston Felting Company was doing no business except on account of the American Felt Company. The account of the Boston Felting Company with the American Felt Company was closed in March, 1900.

"I find that the pass book of the said partnership showed no deposit of cash of the amount of $1,250 or of any sum nearly as large during the period of several weeks after the date of said check. I find that the firm had exchanged their checks for cash during that time and that some of them were for sums nearly as large, but that almost all of these, and particularly the large ones, were for customers. I find that the firm had no customer by the name of Hattie I. Babcock. I find it was the custom of the bookkeepers to put the cash into the drawer and pay with it any bills which were presented, and that it might be some days after the cash was received before a deposit of what remained of it was made. The bookkeepers further testified that when they paid bills from cash out of the drawer, they made slips showing the transaction, which slips were copied into an account

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and sent monthly to the New York office of the American Felt Company and that the slips were then destroyed. None of these slips of the books of the American Felt Company were produced at the hearing, though demand to produce them was made by the plaintiff upon the defendant.

"I find that about the date of this check the Boston Felting Company was not contracting indebtedness or paying bills therefor on its own account in cash. . . .

"Upon all the evidence I find that there was no agreement between the plaintiff and defendant that this balance should be charged off to profit and loss; I find that the defendant has not satisfactorily accounted for said sum, and I rule that the defendant, as liquidating partner, is chargeable to the plaintiff for the latter's share thereof."

The substance of the defendant's exceptions sufficiently appears in the opinion. There was a hearing upon the exceptions before *Fox*, J., who overruled them and decreed that the master's report be confirmed and that the sum therein found to be due to the plaintiff be paid to him by the defendant. There was no decree for a dissolution. The defendant appealed.

C. E. Allen, for the defendant.

C. S. Wing, for the plaintiff.

BRALEY, J. The plaintiff having obtained a decree, the case is before us on the defendant's exceptions to the master's report, which may be dealt with in the order of presentation.

Upon the sale of the firm's business to the American Felt Company, no assets remained except the bills receivable, which the defendant took over to collect for the purpose of closing its affairs, accounting, however, to the plaintiff for his share. The partnership, while it had ceased to do business, not having been dissolved, it was the duty of each partner for their mutual benefit to aid in the settlement without compensation. *Dunlap* v. *Watson*, 124 Mass. 303. The defendant, moreover, having taken upon himself the duty of liquidation, and there having been no express agreement that he should be paid, must be held to have contributed his services, even if they may have been more onerous because of the litigation which arose in the collection of the outstanding debts. Nor did the plaintiff's request, that he close the accounts and attend to the lawsuits, subject the defendant

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to any greater burden than he had assumed already voluntarily, or take the case out of the usual rule. *Schenkl* v. *Dana*, 118 Mass. 236. *Dunlap* v. *Watson*, *ubi supra*. The master's disallowance of the defendant's claim for extra compensation, and charging him with one half of the sum he had retained for personal services and for time spent in attending lawsuits and winding up the business was right.

It appears that for some time after the sale the American Felt Company did not assume active control, and the defendant, who acted as agent and manager for the vendee, continued the business in the name of the partnership, but for the account of the company. Upon adjustment of this account, there remained a balance due from the company to the firm, which the defendant directed should be charged off to profit and loss. The evidence is not reported, but, having determined that the defendant failed to account satisfactorily for this amount, the master accordingly held him liable for the plaintiff's share. If as liquidating partner he chose to use the firm's name and ostensibly the firm's money in carrying on business for the convenience of the succeeding company in which he alone was interested, and the books of the firm, kept either by him or under his direction, disclosed an outstanding indebtedness as the result of the transactions, due from a debtor apparently solvent, the business done was the business of the firm for which the defendant was properly held to be accountable to the plaintiff. *Topliff* v. *Jackson*, 12 Gray, 565. *Jones* v. *Dexter*, 130 Mass. 380. *Moore* v. *Rawson*, 185 Mass. 264, 275. *Brown's appeal*, 89 Penn. St. 139.

In stating the account, the defendant was required to show that the money received either was available for distribution or had been lawfully disbursed. The report states that nearly six months after the sale a check in the name of the firm had been drawn by him covering the amount of the last disputed item in the exceptions. Having ascertained that the firm, even if doing business on account of the company, had no customer bearing the name of the payee, and that the defendant failed to explain the entry or to show that the plaintiff ever had assented to crediting the profit and loss account with the face of the check, he rightly allowed the plaintiff his share of the unauthorized payment. Indeed it would not be an unwarranted inference from

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the facts recited, that the defendant used this money for the payment of his private debts.

But if the exceptions to the master's statement of the account, therefore, are not tenable, a final exception is urged to his allowance of interest on the balance due from July 1, 1903. If generally in the settlement of a partnership account where no provision is found in the articles of agreement as to interest, interest does not begin to run until dissolution or a demand on the liquidating partner for an accounting, in this case the master expressly finds that the defendant "has used for his own purpose the share of the assets of the copartnership to which the plaintiff was entitled." In connection with this finding he also reached the conclusion that the period of three and a half years elapsing between the sale and July 1, 1903, afforded a reasonable time within which to adjust its affairs and pay over the money. It furthermore being plain from the entire report that the defendant after that date enjoyed the use of the plaintiff's share for his own benefit, although the plaintiff previously had asked for a settlement and was finally obliged to bring suit, the exception to the allowance of interest also fails. *Dunlap* v. *Watson, ubi supra. Moore* v. *Rawson, ubi supra.*

But, while the decree of the Superior Court correctly overruled the exceptions and confirmed the report, it contains no order for a dissolution. If before bringing suit no formal notice to dissolve was given, yet, there having been no definite agreement in the oral contract as to the time that it was to continue, the partnership should be treated as being strictly at will and as dissolved from the date of the filing of the bill. *Fletcher* v. *Reed*, 131 Mass. 312. *Mellersh* v. *Keen*, 27 Beav. 236. A final decree upon an accounting between partners, where the partnership has ceased to do business and is to be wound up, ordinarily is not entered except upon a dissolution. Under the prayer for general relief, the decree should include such an order, and when so modified it is affirmed. *English* v. *Foxall*, 2 Pet. 595, 612.

Ordered accordingly.

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MICHAEL MABARDY & others *vs.* PATRICK McHUGH & another.

Middlesex. March 3, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Deceit. Stare decisis. Sale, Caveat emptor.

Where, in the negotiations preceding a sale of real estate, the owner shows to the prospective purchaser upon the face of the earth the true boundaries of the land and does not fraudulently dissuade him from full examination and measurement, and the estate is not so extensive or of such a character as reasonably to be incapable of inspection and estimate, and there is no relation of trust between the parties, and the owner knowingly makes a false representation as to the area of the land, relying on which the prospective purchaser buys the land, the purchaser cannot maintain an action of tort for deceit against the seller.

Discussion by RUGG, J., of the principle of *stare decisis*.

An action of tort for deceit cannot be maintained upon a representation of facts made by the defendant in an honest belief that the facts are as represented, although the plaintiff, believing the facts to be as represented, may have acted upon such belief and have suffered damage because the facts were not as the defendant represented them to be.

TORT for deceit in the sale of land. Writ in the Superior Court for the county of Middlesex dated January 18, 1906.

The case was tried before *Stevens*, J. The facts are stated in the opinion. The jury found for the defendants; and the plaintiffs alleged exceptions.

The case was submitted on briefs.

J. T. Connolly & J. L. Sheehan, for the plaintiffs.

J. H. Vahey, P. Mansfield & T. F. Vahey, for the defendants.

RUGG, J. This is an action of tort sounding in deceit. There was evidence tending to show that the plaintiffs went upon a certain irregularly shaped tract of land (for false representations inducing the purchase of which this action was brought) with one of the defendants, who pointed out the true boundaries and fraudulently stated that the tract contained sixty-five acres, when in fact it contained forty and three fourths acres. Upon this aspect of the evidence, the trial judge instructed the jury

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that "if the plaintiffs . . . were taken over the farm by th defendants . . . or [and] were shown the bounds so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendant in relation to the acreage." The evidence being conflicting as to whether the boundaries were shown, the jury were further instructed that if the defendant, who talked with the plaintiffs, "knew that there were not sixty-five or nearly sixty-five acres, or if he did not know anything about it and stated it as a fact within his personal knowledge, then it would be a false representation for which he would be liable provided" the other elements essential to a recovery were found to exist.

The correctness of the first of these instructions is challenged. It is in exact accordance with the law as laid down in *Gordon* v. *Parmelee*, 2 Allen, 212, and *Mooney* v. *Miller*, 102 Mass. 217. The facts in the case at bar are similar in all material respects to these cases. An attempt is made to distinguish them on the ground that the present plaintiffs were Syrians, ignorant of our language, and that hence a trust relation existed between them and the defendant. But whatever else may be said of this contention, it fails because they were accompanied by two of their own countrymen, who were thoroughly familiar with our language and acted as interpreters for them. In effect, the contention of the plaintiffs amounts to a request to overrule these two cases. They have been cited with approval in *Roberts* v. *French*, 153 Mass. 60, and as supporting authorities, without criticism, in other opinions. The court, however, has refused to apply the rule of those decisions to other facts closely analogous. See *Lewis* v. *Jewell*, 151 Mass. 345; *Holst* v. *Stewart*, 161 Mass. 516; *Whiting* v. *Price*, 172 Mass. 240; *Kilgore* v. *Bruce*, 166 Mass. 136. This court in recent years, by pointed language and by conclusions reached, has indicated a plain disposition not to extend legal immunity for the falsehood of vendors in the course of negotiations for sales beyond the bounds already established. *Dawe* v. *Morris*, 149 Mass. 188, 192. *Way* v. *Ryther*, 165 Mass. 226. *Kilgore* v. *Bruce*, 166 Mass. 136. *Andrews* v. *Jackson*, 168 Mass. 266, 268. *Whiting* v. *Price*, 172 Mass. 240. *Boles* v. *Merrill*, 173 Mass. 491.

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Arnold v. *Teel*, 182 Mass. 1, 4. *Adams* v. *Collins*, 196 Mass. 422. *Long* v. *Athol*, 196 Mass. 497, 504. *Gurney* v. *Tenney*, 197 Mass. 457. *Lyons Burial Vault Co.* v. *Taylor*, 198 Mass. 63. *Rollins* v. *Quinby*, 200 Mass. 162.

This judicial attitude perhaps reflects an increasingly pervasive moral sense in some of the common transactions of trade. While the science of jurisprudence is not, and under present conditions cannot be, coextensive with the domain of morality, nor generally undertake to differentiate between motives which mark acts as good or bad, yet it is true, as was said by Mr. Justice Brett, in *Robinson* v. *Mollett*, L. R. 7 H. L. 802, 817, that "The courts have applied to the mercantile business brought before them what have been called legal principles, which have almost always been the fundamental ethical rules of right and wrong." This is only a concrete expression of the broader generalization that law is the manifestation of the conscience of the Commonwealth.

In many other jurisdictions the rule of *Gordon* v. *Parmelee* and *Mooney* v. *Miller* has not been followed and false representations as to area of land, even though true boundaries were pointed out, have been held actionable. *McGhee* v. *Bell*, 170 Mo. 121, 135, 150. *May* v. *Loomis*, 140 N. C. 350. *Boddy* v. *Henry*, 113 Iowa, 462, 465; *S. C.* 126 Iowa, 31. *Antle* v. *Sexton*, 137 Ill. 410. *Estes* v. *Odom*, 91 Ga. 600, 609. *Lovejoy* v. *Isbell*, 73 Conn. 368, 375. *Cawston* v. *Sturgis*, 29 Ore. 331. *Starkweather* v. *Benjamin*, 32 Mich. 305. *Paine* v. *Upton*, 87 N. Y. 327. *Mitchell* v. *Zimmerman*, 4 Texas, 75. *Walling* v. *Kinnard*, 10 Texas, 508. *Speed* v. *Hollingsworth*, 54 Kans. 436. See also *Fairchild* v. *McMahon*, 139 N. Y. 290; *Schumaker* v. *Mather*, 133 N. Y. 590.

Other cases apparently opposed to the Massachusetts rule, on examination prove to go no further than to decide that misrepresentations as to area, when there is no evidence that boundaries were shown, constitute deceit. *Griswold* v. *Gebbie*, 126 Penn. St. 353. *Cabot* v. *Christie*, 42 Vt. 121. *Coon* v. *Atwell*, 46 N. H. 510. *Ledbetter* v. *Davis*, 121 Ind. 119. *Perkins Manuf. Co.* v. *Williams*, 98 Ga. 388. *Sears* v. *Stinson*, 3 Wash. 615. *Hill* v. *Brower*, 76 N. C. 124. *Stearns* v. *Kennedy*, 94 Minn. 439. This is the substance of the latter part of the in-

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struction given in the Superior Court, and is the law of this Commonwealth.

The rule of *Mooney* v. *Miller* seemingly has been approved or followed in *Lynch* v. *Mercantile Trust Co.* 18 Fed. Rep. 486; *Crown* v. *Carriger*, 66 Ala. 590; and *Mires* v. *Summerville*, 85 Mo. App. 183, although the last case has been overruled in *Judd* v. *Walker*, 114 Mo. App. 128, 135.

If the point were now presented for the first time, it is possible that we might be convinced by the argument of the plaintiffs and the great weight of persuasive authority in its support, especially in view of *Lewis* v. *Jewell*, 151 Mass. 345. But there is something to be said in support of the two earlier decisions now questioned. A purchase and a sale of real estate is a transaction of importance and cannot be treated as entered into lightly. People must use their own faculties for their protection and information, and cannot assume that the law will relieve them from the natural effects of their heedlessness or take better care of their interests than they themselves do. Thrift, foresight and self-reliance would be undermined if it was the policy of the law to attempt to afford relief for mere want of sagacity. It is an ancient and widely, if not universally, accepted principle of the law of deceit that, where representations are made respecting a subject as to which the complaining party has at hand reasonably available means for ascertaining the truth and the matter is open to inspection, if, without being fraudulently diverted therefrom, he does not take advantage of this opportunity, he cannot be heard to impeach the transaction on the ground of the falsehoods of the other party. *Salem India Rubber Co.* v. *Adams*, 23 Pick. 256, 265. *Slaughter* v. *Gerson*, 13 Wall. 379, 383. *Long* v. *Warren*, 68 N. Y. 426, 432. *Baily* v. *Merrell*, 3 Bulstr. 94. This rule in its general statement applies to such a case as that before us. It is easy for one disappointed in the fruits of a trade to imagine, and perhaps persuade himself, that the cause of his loss is the deceit of the other party, rather than his own want of judgment.

It is highly desirable that laws for conduct in ordinary affairs, in themselves easy of comprehension and memory, when once established, should remain fast. The doctrine of *stare decisis* is as salutary as it is well recognized. *Rogers* v. *Goodwin*, 2 Mass.

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475, 478. *Holmes* v. *Hunt*, 122 Mass. 505, 516. *Smith* v. *Worcester*, 182 Mass. 232. *Commonwealth* v. *Walsh*, 196 Mass. 369. *Spicer* v. *Spicer*, Cro. Jac. 527. *Pollock* v. *Farmers' Loan & Trust Co.* 157 U. S. 429, 574, 638. *Goodtitle* v. *Kibbe*, 9 How. 471, 478. *Minnesota Co.* v. *National Co.* 8 Wall. 332. While perhaps it is more important as to far-reaching juridical principles that the court should be right, in the light of higher civilization, later and more careful examination of authorities, wider and more thorough discussion and more mature reflection upon the policy of the law, than merely in harmony with previous decisions (*Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, 322), it nevertheless is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it. As to many matters of frequent occurrence, the establishment of some certain guide is of more significance than the precise form of the rule. It is likely that no positive rule of law can be laid down that will not at some time impinge with great apparent severity upon a morally innocent person. The law of gravitation acts indifferently upon the just and the unjust. A renewed declaration of law that is already in force, supported by sound reason and not plainly wrong, in the long run probably works out substantial justice, although it may seem harsh in its application to some particular case. These considerations are regarded as so weighty by the House of Lords that it cannot overrule any of its own decisions. *London Tramways Co.* v. *London County Council*, [1898] A. C. 375.

The conclusion is that we do not overrule the decisions whose soundness has been debated at the bar, although we do not extend their scope, but confine them strictly to their precise point, namely, that where the seller of real estate shows upon the face of the earth its true boundaries to the purchaser and does not fraudulently dissuade him from making full examination and measurement and the estate is not so extensive or of such character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no remedy for a misrepresentation as to the area alone.

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The instruction as to the difference between representation and expression of opinion* was adequate and adapted to the testimony.

The charge is not reported in full. No requests for rulings were presented, and the only exceptions relate to the statement of the rule of *Gordon* v. *Parmelee* and *Mooney* v. *Miller*. It does not appear, therefore, that full instructions were not given as to the effect of fraudulent dissuasion by the defendants (of which there was some evidence) from a full examination of the farm by the plaintiffs.

Exceptions overruled.

CHARLES H. STEBBINS, assignee, *vs.* CONNERS BROTHERS CONSTRUCTION COMPANY.

Middlesex. March 3, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Contract, What constitutes, Performance and breach. *Assignment*, For benefit of creditors.

At the trial of an action for an alleged breach by the defendant of a contract by which the plaintiff was to do certain work upon a building as a sub-contractor under the defendant, the alleged breach being a refusal of the defendant to permit the plaintiff to carry out the contract, it appeared that a certain person on or about August 20 had submitted to the defendant a bid for the perform-

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* The portion of the charge referred to was as follows: "Now, what is the next issue? It is that those representations were known by the person who made them — that is, by the defendant McHugh, — to be false; or that, not knowing them to be true, he represented them to be true. If he expressed an opinion that there were sixty-five acres, and that expression of opinion was made in good faith, it would not be a false representation for which he could be bound; because there must have been a fraudulent intent on his part, although he is bound by the natural results of his own statement. But if he stated an opinion that there were sixty-five acres, and that was an honest opinion, he could not be held, however mistaken he may have been. But if he knew that there were not sixty-five or nearly sixty five acres, or if he didn't know anything about it and stated it as a fact within his personal knowledge, then it would be a false representation for which he would be liable; provided, further, that it was a material representation, and that it was a representation that induced these plaintiffs to buy the farm."

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ance of the work, and, after conversation with the architect, had signed on September 29 an agreement in writing to reduce his bid a certain percentage, and to "put up a bond of 33% of" his contract, that on November 20 such person made an assignment for the benefit of his creditors to the plaintiff who continued the business with the assignor as manager, that on December 1 the plaintiff signed with the defendant the contract declared on, which was dated September 29, in which there was no mention of a bond or of the agreement of the plaintiff's assignor dated September 29, but in which the price fixed upon was the amount of the original bill less the reduction agreed upon on September 29 by the plaintiff's assignor. The plaintiff testified that nothing had been said to him about a bond before the execution of the contract declared on. The plaintiff's assignor testified that shortly after he made the agreement of September 29 he might have told the architect that he was getting a bond fixed up and that it would be ready in a day or two. *Held*, that the questions whether there ever was an agreement that the giving of a bond should be a condition precedent to the contract becoming of binding force, and whether, if there ever was such an agreement, it had been waived, were for the jury.

CONTRACT for damages resulting to the plaintiff from a refusal by the defendant to permit the plaintiff to carry out a contract in writing which provided that the plaintiff for an agreed price should do the fireproofing for a building for the Knights of Columbus at New Haven, Connecticut, being erected by the defendant as general contractors. Writ in the Superior Court for the county of Middlesex dated September 13, 1905.

The case was tried before *Hardy*, J. There was evidence tending to show that one Fernald of a firm called Burge and Fernald, having examined the plans and specifications of one Faxon, an architect, according to which the defendant was to erect the building in question, wrote to the defendant as follows: "Boston, August 20, 1904. Messrs. Connors Bros. Boston, Mass. Gentlemen: It will cost for terra cotta arches, partitions, fireproofing beams, columns and girders in building for Knights of Columbus at New Haven, Conn., as per plans and specifications by John Lyman Faxon, architect, the sum of $8537.00. Concrete over said arches will cost $934.00 additional. Respectfully yours, Burge & Fernald." A duplicate of the bid was sent directly to the architect, who later advised Fernald that his firm was the successful bidder for the fireproofing, whereupon Fernald wrote to the defendant as follows: "Boston, Sept. 6, 1904. Messrs. Connors Bros., Lowell, Mass. Gentlemen: Mr. Faxon advises us that we are the successful bidders on the Knights of Columbus Building at New Haven, in con-

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nection with you, and we would ask that, at present, you will please give us an acceptance of this work, and later on, if you care to make any contract, we could do so at most any time. We would like to close this work as we want to order the goods. Respectfully yours, Burge & Fernald." Later Fernald had conversations with the architect, with whom were most of his conversations regarding the fireproofing, and on September 29, 1904, as a result of such conversations, signed with other sub-contractors the following:

"Sep 29 1904

"In re 'int work' for Knights of Columbus Building, New Haven, Conn. — under contract with the Connors Bros. Const. Co. of Lowell.

"The undersigned sub-bidders on above job hereby agree to take off (reduce) their respective bids, as originally made 5 76/100 % and to execute contracts, for their respective sub work with said Connors Bros. Construction Co. as soon as said contract forms are perfected, and to individually put up a bond of 33 % of the amount of said individual contracts."

The witness Fernald testified that the bid referred to in the agreement of September 29 was that contained in the foregoing letter dated August 20.

The agreement of September 29 was admitted in evidence subject to an exception by the plaintiff.

It further appeared that on November 20, 1904, the firm of Burge and Fernald made an assignment for the benefit of their creditors to the plaintiff, who continued the business, Fernald acting as manager.

On December 1, 1904, the plaintiff and the defendant signed under seals the contract declared on, the plaintiff signing under the name, "Burge & Fernald, By Charles H. Stebbins S." The opening paragraph of the contract was as follows:

"Sept. 29, 1904.

"Made this twenty-ninth day of September, 1904, by and between the Conners Bros. Construction Co. . . . party of the first part, and Burge and Fernald . . . party of the second part."

The price to be paid for the work agreed to be performed was the price named in the letter of August 20, less the deduction agreed upon in the alleged agreement of September 29. The

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contract declared on contained no mention of a bond. As to it, Fernald further testified as follows:

"Q. And this contract was drawn up as a result of this agreement of September 29th, was it not? A. The price was, the price was.

"Q. . . . Now, I will ask you if it is that contract form referred to in this agreement of September 29, 1904? A. I should say yes.

"Q. Now, I will ask you if this contract form was not executed pursuant to this agreement? A. I should say it was."

Fernald also testified that he might have told the architect shortly after the agreement of September 29 that he was getting a bond fixed up and that it would be ready in a day or two. The plaintiff testified that nothing ever had been said to him about a bond previous to the signing of the contract declared on, that, so far as he knew, no bond ever was furnished by him or Burge and Fernald to the defendant, that after he had made the contract the defendant had talked with him on the telephone about a bond.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

O. Storer, for the plaintiff.

A. S. Howard, for the defendant.

HAMMOND, J. Upon the evidence we think that the questions whether there ever was an agreement that the giving of a bond should be a condition precedent to the validity or binding force of the contract, and whether, if there ever was such an agreement, there was a waiver of the condition, were for the jury, and that the case should have been submitted to them.

Exceptions sustained.

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EVELYN M. D. CLAFLIN *vs.* ARTEMAS H. HOLMES, executor & trustee.

Suffolk. March 8, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Executor and Administrator. Devise and Legacy. Interest. Power.

A testatrix, the will of whose husband contained a provision that the principal of a trust fund, of which she had the income during her life, after her death should be paid to such person or persons in such proportions as she should by will appoint, bequeathed the residue of her estate, including specifically the property over which she had such power of appointment, to her "executors and trustees . . . in trust" for certain enumerated purposes, the eleventh of which read as follows: "To pay to D. . . . the sum of $5,000." The executor paid D. the $5,000 three years and eleven months after the death of the testatrix. *Held*, that D. was entitled to interest at the rate of six per cent per annum upon $5,000 from a year after the death of the testatrix.

The fact that, because of a contest by a legatee, the probate of a will is delayed for over a year does not affect the right of such legatee to interest on a legacy payable to him at the expiration of a year from the death of the testator.

CONTRACT, for interest at the rate of six per cent per annum from the date of the death of the defendant's testatrix upon the amount of a bequest to the plaintiff. Writ in the Superior Court for the county of Suffolk dated March 10, 1908.

The case was heard by *Lawton*, J., without a jury, upon an agreed statement of facts, from which it appeared that the defendant's testatrix, Angie N. Allen, by the will of her husband was given a power of appointment by will over the principal of a fund placed in trust for her benefit during her life in the following language: "After the decease of my said wife, one half of the principal of said Trust Estate is to be paid over and conveyed to such person or persons and in such proportions as my said wife shall by will appoint." Angie N. Allen died on March 14, 1904, and her will was presented for probate by the defendant. Its proof was opposed by the plaintiff and others on the ground of alleged fraud and undue influence of the defendant, the contest being carried from the Probate Court to the Supreme Judicial Court. The will was allowed on April 22, 1905.

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The tenth clause of the will gave the residue of the estate, "including my share of the principal of the Trust Fund established by my late husband . . . over which . . I have the right and power of appointment" to "my executors and trustees . . . in trust" for various purposes, the eleventh of which is quoted in the opinion. The $5,000, which was directed to be paid to the plaintiff in the clause thus quoted, was paid to her by the defendant on February 12, 1908, and, before this action was brought, he paid her the further sum of $114 "which," the agreed facts state, "the plaintiff has applied in partial satisfaction of the sum claimed to be due her for interest."

The property, out of which the $5,000 was paid to the plaintiff by the defendant, netted during this period only two per cent income to the defendant. It "was managed with due care by agents approved by all parties in interest," and "no more income could have been secured."

On the foregoing facts, the judge ruled that the plaintiff was entitled to interest at the rate of six per cent per annum from the expiration of one year from the death of the testatrix, found for the plaintiff in the sum of $760 and reported the case for determination by this court.

The plaintiff contended that she was entitled to interest at the rate of six per cent per annum on the sum given to her, from the date of the death of the testatrix. The defendant contended that the plaintiff was entitled to no more than the actual income of that part of the property held in trust which the gift represented, and further that such income should be allowed from the date of the ascertainment and transition of the residue into the defendant's hands as trustee, as distinguished from executor; and that, if interest at six per cent should be allowed, it should be allowed only from one year after the death of the textatrix.

C. A. Williams, (*M. Williams* with him,) for the plaintiff.

A. D. Hill, (*F. Sulloway* with him,) for the defendant.

KNOWLTON, C. J. The decision of the question whether interest is to be paid on the legacy of the plaintiff in this case, and if so, from what date, depends upon the construction of the will of the testatrix, in reference to the legacy, and the appointment made by her under the will of her husband, Aaron H. Allen.

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In legal effect the legacy does not differ from an ordinary pecuniary legacy in a will. Property to a considerable amount, derived in part from the remainder of her estate after the payment of debts and certain legacies, and in part from a fund of which she had a power of appointment under her husband's will, was given by her will to her executors and trustees, in trust to pay fourteen different pecuniary legacies, each of which was set forth in terms similar to those of the legacy to this plaintiff, which are as follows: "XI. To pay to Evelyn M. A. Dailey, [the plaintiff] if she shall survive me, the sum of five thousand dollars."

The fact that a part of the money from which this legacy was to be paid was to be derived from the fund appointed to her executors under the power did not change the character of the legacy, or the time when it became payable. Such legacies ordinarily become payable at the expiration of one year from the testator's death, and interest is to be allowed on them from that time. *Ogden* v. *Pattee*, 149 Mass. 82.

There was no reason, in the terms of this will, why these legacies mentioned in the fourteen subdivisions of the tenth clause should be paid earlier than that time, nor was there any reason why their payment should be postponed to a later date.

That there was delay in the probate of the will, even though it was caused by a contest against the allowance of it carried on by the plaintiff and other members of her family, does not affect her right to interest on her legacy from the time when it became payable. *Kent* v. *Dunham*, 106 Mass. 586.

Judgment for the plaintiff on the finding.

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NORFOLK HARDWOOD COMPANY *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Suffolk. March 4, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Sale, Vendor's lien. *Lien*. *Carrier*, Stoppage *in transitu*. *Replevin*.

Where a vendor consigns goods shipped by freight to its own name in the city where the purchaser does business, and, upon being notified by the carrier of their arrival at their destination, expressly authorizes the carrier to deliver the goods to the purchaser, and the carrier thereupon at the request of the purchaser transports the goods to the carrier's warehouse in a neighboring city and stores them there in the name of the purchaser, the vendor cannot maintain replevin against the carrier for the goods, since, although the freight charges for the original shipment of the goods remain unpaid, he no longer has any right to the possession of the goods, both because he has lost his vendor's lien by the delivery to the purchaser's order, authorized by him, and because the goods are no longer in transit in the course of the shipment made by him, but have entered upon a new shipment and upon storage authorized by the purchaser alone.

REPLEVIN for lumber shipped by the plaintiff from Ellisville, Mississippi, to itself as consignee in East Cambridge. Writ in the Superior Court for the county of Suffolk dated October 1, 1908.

The case was heard upon agreed facts by *Sanderson*, J. The facts are stated in the opinion. The judge found for the defendant and assessed damages to the defendant in the amount of the value of the lumber less all charges of the defendant. The plaintiff appealed.

F. Hunt, for the plaintiff.

A. E. Burr, for the defendant.

SHELDON, J. This action has been argued for the plaintiff as if it presented merely a question of the right of stoppage *in transitu*, but we are of opinion that this is not the case. The plaintiff, although it accepted the order of the Cambridge Lumber Company for the lumber in question, and undertook to forward the lumber accordingly, yet when it came to ship the goods, consigned them to itself and took a bill of lading running to itself. It thus, as between itself and the purchaser, retained the possession and control of the lumber, and retained also its vendor's lien for the agreed price. Benjamin on Sales, § 824, and

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cases cited. If the plaintiff has not lost this lien by parting with the possession of the goods, it can hold them, in spite of the credit agreed to be given, upon the insolvency of the purchaser. *Arnold* v. *Delano*, 4 Cush. 33. But if a delivery has been made to the purchaser by the authority of the plaintiff, then its lien, depending solely upon the possession of the property, is gone, and the plaintiff cannot hold the goods. *Haskins* v. *Warren*, 115 Mass. 514.

When the car containing this lumber arrived at East Cambridge on August 4, 1904, the defendant's agent notified the plaintiff thereof, and the plaintiff on August 6 informed the agent by letter that the car was intended for the Cambridge Lumber Company, which is hereinafter called the purchaser; and on August 12, the plaintiff, at the request of the defendant's agent, expressly authorized delivery to be made to the purchaser. In the meantime, on August 8, the defendant, at the request of the purchaser, forwarded the car containing the lumber from East Cambridge to the defendant's Huntington Avenue storehouse in Boston, and issued to the purchaser a local way bill naming the purchaser as the consignee. On August 10, the purchaser requested the defendant to store these and some other goods; and the defendant did accordingly store them in the name of the purchaser in its storehouse aforesaid, where they remained until taken by the plaintiff on this writ of replevin.

There can be no doubt upon these facts that the property, subject to the defendant's lien for its proper charges, was delivered by the defendant to the purchaser with the consent and authority of the plaintiff; and the plaintiff's lien for the price of the lumber was thus destroyed. And this is confirmed by the fact that the plaintiff, in its letter of September 12, 1904, written to the defendant after a question had arisen as to the freight bill upon these goods, expressly said that it "of course [had] nothing to do with what became of the lumber in this car." The plaintiff voluntarily gave up its lien upon the property; it does not rest its claim upon the allegation that this was procured by means of any fraud practised upon it; and it cannot now reinstate itself in its original position.

If however it were necessary to pass upon that question, we

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should be obliged to hold that the plaintiff had failed to show any right to stop these goods *in transitu*. The goods were to be transported to East Cambridge, and, according to the final directions of the plaintiff, to be there delivered to the purchaser. The right of stoppage *in transitu* would continue until the goods were delivered to the purchaser, or until, by some new arrangement between the carrier and the purchaser, the former had recognized the title of the latter, had attorned to it, and agreed to hold the goods, not merely as carrier or as a warehouseman pending a complete delivery to the purchaser, but as agent for the purchaser under a new contract made and assented to by both the carrier and the purchaser. *Brewer* v. *Boston & Albany Railroad*, 179 Mass. 228. The fact that the carrier's prior charges have not been paid, although strong evidence that no such new contract has been made, is not decisive. *Brewer* v. *Boston & Albany Railroad*, *ubi supra*. *Ex parte Barrow*, 6 Ch. D. 783. *Ex parte Cooper*, 11 Ch. D. 68. *Kemp* v. *Falk*, 7 App. Cas. 573. *McLean* v. *Breithaupt*, 12 Ont. App. 383. *Calahan* v. *Babcock*, 21 Ohio St. 281. *Jeffris* v. *Fitchburg Railroad*, 93 Wis. 250. *Symns* v. *Schotten*, 35 Kans. 310.

But here, although the defendant's charges remained unpaid, it yet did make a new agreement with the purchaser for the further transportation of these goods to a neighboring city; and it carried out that agreement. There was more than a mere storage of the goods for the convenience of the purchaser, which would not have terminated the transit. There was a recognition of the purchaser as owner, and a new transit, made under a new agreement with the purchaser, to a new destination, for the expenses of which the plaintiff personally could not have been held. If this new agreement had been made by the purchaser with another railroad company, which had paid the defendant's charges and made the new transportation, there could be no question that the original transit had ended, even though this new carrier held the goods not only for the freight due to itself, but also for the past charges of the former carriers which it would have satisfied. The original transit is at an end when the goods have reached their original destination; and when after this they are actually sent by the purchaser to a new destination, the right of stoppage *in transitu* is as effectually destroyed as if

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he had taken manual possession of them and placed them in his own warehouse. This has been clearly stated by Lord Esher, in *Bethell* v. *Clark*, 20 Q. B. D. 615, 617, in which it was held that the original transit was not terminated: "There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone." To the same effect in substance, see *Ex parte Gibbes*, 1 Ch. D. 101; *Ex parte Miles*, 15 Q. B. D. 39; *Kendal* v. *Marshall*, 11 Q. B. D. 356; *Biggs* v. *Barry*, 2 Curtis, 259; *Sawyer* v. *Joslin*, 20 Vt. 172; *Guilford* v. *Smith*, 30 Vt. 49. This is assumed in *Brooke Iron Co.* v. *O'Brien*, 135 Mass. 442. It can make no difference in principle that the new directions were given by the purchaser to the original carrier, and that the new transit was made over the lines of the original carrier. This was the case in *Mollison* v. *Lockhart*, 30 New Brunswick, 398, but that circumstance was not deemed worthy of notice.

Accordingly the plaintiff had no right of stoppage *in transitu* when it replevied these goods, and no right to their possession, and cannot maintain this action.

There is much to indicate that the plaintiff might have rescinded its sale of this lumber on the ground that it was procured by the fraud of the purchaser; but that position does not seem to have been taken in the Superior Court, and has not been contended for here. Moreover the case was heard upon agreed facts, without giving to the court power to draw inferences therefrom. *Brooks* v. *West Springfield*, 193 Mass. 190. *Coffin* v. *Artesian Water Co.* 193 Mass. 274. *Cunningham* v. *Connecticut Ins. Co.* 200 Mass. 333.

The judgment for the defendant must be

Affirmed.

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THOMAS HALLEY *vs.* NASHUA RIVER PAPER COMPANY.

Middlesex. March 4, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

A boy seventeen years of age employed in a paper mill as a third hand upon a paper machine one hundred and fifty feet long, on which dryer rolls and calender rolls revolve with great rapidity, whose duty it is to go into a narrow space between the two kinds of rolls and take out the broken paper which has fallen to the floor, if he knows that the whole machinery is "helping to pull the paper through" and that "the calender rolls were going when the paper was in there," but does not know that there is a suction caused by the revolution of the calender rolls and a likelihood that a roll of paper may be sucked in by those rolls, does not assume the risk of an injury caused by a roll of paper, which he has gathered up and is carrying in his arms, being sucked in by the calender rolls so quickly that he cannot let go of the paper before his hand is drawn in between the rolls.

LORING, J. This is an action for personal injuries in which a verdict was ordered for the defendant. The case is here on an exception to that order.

The jury were warranted in finding that the plaintiff, a minor seventeen years of age, went to work in the defendant's paper mill on July 18, 1907. The accident happened on the fifteenth day of the following August, — three weeks and three days after he went to work. The plaintiff was third hand on one of three paper machines one hundred and fifty feet long. Pulp is run into the wet end of this machine, and paper comes out of the other end of it. Three men tend one machine. The duty of the third hand is to take the broken paper off the floor between the calenders and the dryers, to put it into a car and to take it away. It would seem from the description of the machine given in the bill of exceptions that the pulp after running on a wire arrangement is delivered on to a felt band which runs for some fifty feet over and under dryers or dryer rolls. These dryer rolls consist of a long series of hot rolls filled with steam. The pulp is dried by being carried on the felt running between the rolls. From the felt the dried pulp is delivered into the calender stack. The calender stack consists of a series of heavy cast iron rollers, one on top of the other, revolving at great speed. Both the

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dryer rolls and the calenders are very hot, — the dryer rolls from the steam inside of them and the calender rolls from the friction of the rolls, caused by their operation. Paper is apt to break off and fall between the dryers and the stack of calender rolls, and it is the duty of the third hand to go in between the two and take out the broken paper which so has fallen to the floor. The bill of exceptions is somewhat obscure as to the character of the place between the dryers and the calenders: "The opening into that space is slanting and is only about four inches wide at the bottom and gets wider as it goes up. . . . There is a three foot space between the dryers and the calenders." One has to go in sideways because the entrance is so narrow.

When the plaintiff went in between the dryers and the calenders on the occasion in question, the broken paper was five inches deep on the floor. The plaintiff had to go and did go down on his hands and knees; he picked up the paper from under the calender rolls, rolled it up and pulled it toward him as he gathered it up. The paper consisted of a roll about six feet long, — "as much as he could carry in his arms." As the plaintiff started to rise to go back with the paper in his hands, the ragged ends of the paper which were then "a foot from the calenders" were sucked in by the two lower calender rolls so quickly that the plaintiff could not let go his hand, and it was carried in between two of the rolls and held there for thirty minutes.

No warning had been given to the plaintiff of the fact that there was a suction there.

We are of opinion that the jury would have been warranted in finding that the place where the plaintiff was set to work was a dangerous one, owing to the peculiar conditions of the place where he had to work and to the likelihood of a roll of paper being sucked in by the calender rolls. The plaintiff testified that "he knew the whole machine was helping to pull the paper through; he knew the calender rolls were going when the paper was in there." But that is not testimony that there was a suction and that he knew and appreciated the dangers incident to the work by reason thereof. The case comes within *De Costa* v. *Hargraves Mills*, 170 Mass. 375; *Joyce* v. *American Writing Paper Co.* 184 Mass. 230; *Manning* v. *Excelsior Laundry Co.* 189 Mass. 231; *Byrne* v. *Learned*, 191 Mass. 269; *Heffernan*

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v. *Fall River Iron Works Co.* 197 Mass. 28. See also in this connection *Bowden* v. *Marlborough Electric Machine & Lamp Co.* 185 Mass. 549; *Rudberg* v. *Bowden Felting Co.* 188 Mass. 365.

In *Burke* v. *Davis*, 191 Mass. 20, the accident was not caused by suction and the employee was not in a peculiar and cramped position.

Exceptions sustained.

H. C. Long, for the plaintiff.

E. C. Stone, for the defendant.

FRANK H. MORIARTY *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. March 5, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence. Railroad. Agency.

If the foreman of section men, who have been removing old ties from the bed of a railroad near a station, gives some of the ties to a stranger, at his request, with permission to take them away, and in taking them away the stranger places two of the ties on the passenger platform of the station, and negligently leaves them there, where a passenger, alighting from a train after dark, stumbles over them and is injured, in an action by such passenger against the railroad corporation maintaining the track and station for his injuries thus caused, there is no evidence that the stranger who left the ties on the platform was the agent of the defendant in doing so, but it is a question for the jury whether the section foreman or the station master, who knew that a stranger was at work removing the ties, was negligent in not preventing the leaving of the ties on the platform where a passenger alighting from a train would be likely to stumble over them.

TORT for personal injuries incurred on November 1, 1905, at about half past six o'clock in the evening, when the plaintiff had alighted from a train of the defendant, on which he was a passenger, at the station of the defendant at West Acton, by reason of the plaintiff stumbling over two old railroad ties on the station platform, which had been left there by one O'Brien to whom they had been given by one O'Connell, a section foreman of the defendant. Writ dated February 10, 1906.

In the Superior Court the case was tried before *Lawton*, J.

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The findings warranted by the evidence are indicated sufficiently in the opinion.

At the close of the evidence, the defendant asked the judge to rule that there was not sufficient evidence to justify a verdict for the plaintiff. The judge refused to make this ruling.

The defendant thereupon requested the judge to instruct the jury

1. That there was not sufficient evidence to justify the jury in finding that O'Brien was the agent of the defendant in removing the ties.

2. That the jury would not be warranted on the evidence in finding that the act of O'Brien in leaving the ties upon the station platform was an act of an agent of the defendant.

3. That there was not sufficient evidence to warrant a finding that O'Connell had authority to make O'Brien an agent of the defendant in removing the ties.

4. That there was not sufficient evidence to warrant a finding that O'Connell had the right as agent of the defendant to give to O'Brien the ties.

The judge refused to give any of these instructions, and submitted the case to the jury with instructions under which the jury could have found that O'Connell made O'Brien the agent of the defendant for the purpose of taking the old ties off its premises. The jury returned a verdict for the plaintiff in the sum of $1,300; and the defendant alleged exceptions.

F. N. Wier, for the defendant.

D. I. Walsh, for the plaintiff.

HAMMOND, J. The plaintiff was a passenger on a train of the defendant which arrived at the station which was upon the east side of the track, about half past six o'clock in the evening. It was dark, and the plaintiff, after alighting from the train and while walking along the platform, stumbled over two railroad ties which had been placed there by one O'Brien, and was injured. These ties were a part of a greater number which had been taken out of the railroad bed by the section men, and had been left on the part of the railroad location westerly of the track and opposite the station platform. On the day of the accident, at the request of O'Brien, the section foreman O'Connell had given him all these ties.

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At the close of the evidence the defendant presented certain requests for rulings which were refused, and the case was submitted to the jury, who found for the plaintiff. The case is before us upon the defendant's exceptions to the refusals to rule as requested, and to certain instructions given.

Among the rulings requested and refused were (1) that there was not sufficient evidence to justify the jury in finding that O'Brien was the agent of the defendant in removing the ties and (2) that the jury would not be warranted on the evidence in finding that the act of O'Brien in leaving the ties upon the station platform was an act of an agent of the defendant. The question, whether O'Brien was an agent of the defendant in removing the ties and in placing the two upon the platform, was left to the jury under instructions which authorized them to find for the plaintiff irrespective of the question whether there was negligence on the part of O'Connell or of the station master, or any other person in the defendant's employ.

In this we think there was error. There is nothing to show that O'Connell had any authority whatever to hire O'Brien to act as an agent or employee of the defendant, or even that he or O'Brien ever supposed that he was hiring O'Brien in any such capacity. In removing the ties O'Brien got Smith to assist him and seems never to have dreamed that he was working under O'Connell's direction. Nor do the circumstances authorize the finding that he was impliedly acting as such agent. Even if it be assumed that in giving O'Brien the ties O'Connell was acting within the scope of his authority, and that it was his duty to see that they were properly removed whether given to O'Brien or not, still this is far short of showing that O'Brien in removing them was acting as the agent of the defendant. He was not attempting to do anything for the defendant. The ties had been given to him with permission to take them away, and in removing them he was taking care of his own property and not at all that of the defendant; and his motive in removing them was not to help the defendant or O'Connell to discharge any duty resting upon them or either of them, but to take and protect his own property. Under these circumstances the defendant was entitled to the rulings requested, above set forth, as to the agency of O'Brien.

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The judge, however, rightly refused to direct a verdict for the defendant. On all the evidence it was a question for the jury whether there was any negligence on the part of O'Connell or the station master. Each knew that O'Brien, a stranger, was at work removing the ties; and we cannot say as matter of law that the jury could not have found that in view of the relation between the defendant and the plaintiff as its passenger, the defendant failed to exercise that degree of care for its passengers which was imposed upon it by law.

But, since there was error as to O'Brien's alleged agency as above stated, the order must be

Exceptions sustained.

JOHN J. EVERSON *vs.* GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, OF PERTH, SCOTLAND.

Middlesex. March 5, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Insurance, Accident. *Words*, "Negotiation," "As soon as possible."

In the provisions of St. 1907, c. 576, § 21, that "no oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss," the word "negotiation" means the entire transaction of applying for and finally issuing the completed contract of insurance, and the provision applies to warranties which are inserted in the policy itself.

A policy of accident insurance contained a condition precedent to liability of the insurer that, in case of an accident, notice thereof should be sent to the insurer "as soon as possible." The insured, while in a lonely camp far from home and kindred, was injured by the accidental burning of one of his hands so severely as to require its amputation two days later. On the fourth day after the accident he sent a notice of it in writing to the insurance company which issued the policy. In an action on the policy, it was *held*, that the requirement meant that due diligence should be used to send the notice with reasonable promptness, and that it was sufficiently favorable to the defendant to leave to the jury, under proper instructions, the question whether the notice was sent as soon as was possible.

In an action on a policy of accident insurance, it appeared that the plaintiff was injured by the accidental burning of one of his hands so severely as to require

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amputation two days later. In the schedule of warranties in the policy the occupation of the plaintiff was described as "proprietor," his business as "manufacturer of infusorial earth," and his duties as "office duties and travelling only." The policy provided that "if the insured is injured . . . in any occupation classified by this corporation as more hazardous than that stated in the schedule of warranties, the corporation's liability shall be only for such proportion of the principal sum . . . as the premium paid by him will purchase at the rate fixed by the corporation for such more hazardous occupation." To show that the plaintiff was injured while in an occupation more hazardous than that described in the warranty, the defendant relied on the facts that for two or three weeks before the accident the plaintiff had been at his works near St. John, New Brunswick, living in a cottage or camp erected for the use of himself and his family, and that, while there, he had directed and assisted in making experiments with infusorial earth in which an acid was used. There was testimony from which it might have been found that substantially all the manual labor was done by a workman, and the plaintiff testified that he went to the works for rest and recreation, and that whatever he did while there was to this end. An employee of the defendant, who had testified as an expert in answer to a hypothetical question that the acts named in the question would place the plaintiff in a more hazardous classification than that described in the policy, also testified that it was the business or employment from which the insured derived his livelihood which determined classification by the defendant. The presiding judge left to the jury the question whether the plaintiff was injured in an occupation classified by the defendant as more hazardous than that stated in the statement of warranties in the policy, and instructed them that, if during the period in question the plaintiff was actually working about machinery, experimenting, using acids, and thus was engaged in a more hazardous occupation, he was entitled only to such portion of the principal sum insured as the amount paid would buy according to the schedule of the company. *Held*, that the question properly was left to the jury, and that the instruction gave the defendant no ground for complaint.

Where a schedule of warranties, contained in a policy of accident insurance, is made up almost wholly of printed partial assertions or questions, without punctuation at the end, and intended to be filled out, and most of them are filled out by written answers, but in some instances nothing is written in the blank space, although the sentences thus left incomplete may be in the form of assertions instead of questions, they are to be treated as unanswered questions, and neither affirmation nor denial can be inferred from an omission to fill out the blank spaces.

CONTRACT upon a policy of accident insurance issued by the defendant, to recover $10,000 and interest thereon for the accidental loss of the plaintiff's right hand, which was injured by fire in a burning building on November 18, 1907, and was amputated on November 22, 1907. Writ dated April 15, 1908.

In the Superior Court the case was tried before *White*, J. Among the instructions requested by the defendant were the following:

"6. The plaintiff made a warranty in the contract or policy

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of insurance declared upon that no application ever made by him for insurance had been declined, and this warranty was not true in fact, and the plaintiff made the same well knowing it to be untrue and with the actual intent and purpose to deceive the defendant and the jury must find for the defendant.

"7. The plaintiff made a warranty in the contract or policy declared upon that he had not in contemplation at the time of the issuance and acceptance of the policy any special journey or hazardous undertaking, whereas at the same time the plaintiff had in fact a special journey in contemplation and that this warranty was material and was not true in fact and was made with actual intent and purpose to deceive the defendant and the jury must therefore find for the defendant.

"8. The plaintiff made a warranty in the contract or policy declared upon that his income per week exceeded the gross amount of weekly indemnity under all policies carried by him and this warranty was material and was not in fact true and the plaintiff made the same knowing that it was untrue and that the plaintiff made it with actual intent and purpose to deceive this defendant and therefore the jury must find for the defendant."

The judge refused to give these and other instructions requested by the defendant, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $10,396.72. The defendant alleged exceptions, raising the questions stated and described in the opinion.

J. F. Bassity, (*J. S. Bassity* with him,) for the defendant.

A. H. Russell, for the plaintiff.

RUGG, J. 1. The first contention of the defendant is that the trial judge erred in refusing to direct a verdict in its favor because of the plaintiff's breach of warranty that his weekly income exceeded the gross amount of weekly indemnity under all policies carried by him. This statement respecting income appears in a rider pasted on the third page of the contract of insurance, the heading of which is "Schedule of warranties made by the insured on the acceptance of this policy." The defendant contends that the statements contained in this schedule, being expressed to be a part of the consideration of the policy, are in substance conditions precedent, compliance with which

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must be proved affirmatively by the plaintiff. Without discussing whether it is possible to convert what are essentially in the nature of things warranties or representations into conditions by describing them as such, it is enough for the purpose of this case to say that the policy in suit manifests no such design. The statement in question occurs under a general heading "Warranties." Although not signed by the plaintiff, the series of statements, of which it forms one, is in the first person and relates to those matters respecting which information would be needed by an insurer in order to determine whether to take the risk and for what amount and at what rate. The heading names it, and its general character stamps it, as a warranty, and there is no reason why it should be treated as anything else. St. 1907, c. 576, § 21, provides that "No . . . warranty made in the negotiation of a contract or policy of insurance by the assured . . . shall be deemed material or defeat or avoid the policy . . . unless . . . made with actual intent to deceive or unless the matter . . . made a warranty increased the risk of loss."

The defendant contends that this statute does not apply to warranties inserted in the policy itself, but only to those made in the discussion preliminary to the issuance of the policy. The soundness of this contention depends upon the interpretation of the word "negotiation" in the statute. Negotiation means the entire transaction of applying for and finally issuing the completed contract of insurance. "To negotiate" as given by lexicographers as well as by courts in substance is to traffic or conclude by bargain or agreement. *Palmer* v. *Ferry*, 6 Gray, 420, 423. Its use in the law of negotiable instruments illustrates this definition. Its application to those preliminary steps, which precede the final execution of a contract or treaty, is a secondary and by no means exclusive signification. Negotiation as employed in this statute comprehends all warranties, whether made in the policy itself or in separate or subordinate or inducing instruments or agreements. Its collocation with warranty necessarily implies this, because a warranty is a stipulation of the contract itself, often distinct from and collateral to the chief purpose of the contract, sometimes expressed in point of time before the main obligations are phrased, yet, whether made previ-

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ously or contemporaneously, none the less a term of the contract, and supported by or becoming a part of its consideration.

The distinction between a warranty and a condition precedent, though sometimes narrow, is nevertheless plain. Such a condition is one without the performance of which the contract, although in form executed by the parties and delivered, does not spring into life. A warranty does not suspend or defeat the operation of the contract, but a breach affords either the remedy expressly provided in the contract or those furnished by the law. This distinction between warranty and condition is accentuated by the statute now under consideration. It prohibits the parties to an insurance contract from attaching to a breach of a warranty the effect of defeating all rights of the insured under the policy, unless in good conscience it ought to have this result, either as increasing the risk or made with intent to deceive. The harshness of the clause formerly common in contracts of insurance, that warranties, if found in any respect untrue, should avoid the policy, is thus mitigated. Under such a provision the conclusion was inevitable that there could be no recovery, if the truth of a statement, although in fact immaterial and not affecting the risk, was made the basis of the contract and it turned out to be false. *Cobb* v. *Covenant Mutual Benefit Assoc.* 153 Mass. 176. *Miles* v. *Connecticut Ins. Co.* 3 Gray, 580. Being remedial legislation the statute must be liberally construed. It follows that the statements in the "schedule of warranties" were made in the negotiation of the insurance contract.

There is nothing inconsistent with this result in *Barker* v. *Metropolitan Ins. Co.* 188 Mass. 542; *S. C.* 198 Mass. 375. The distinction between a condition precedent inserted in the body of the policy as to a subject apart from the common field of warranties or representations, on the one side, and warranties, which are statements as to the physical, material or ancestral condition of the insured, having relation to his desirability as a risk, on the other, was there adverted to and made the basis of the decision. In the present case the amount of the plaintiff's income was left somewhat uncertain on the evidence. Properly the questions as to the falsity of the plaintiff's statement respecting it and his intent to mislead were left to the jury to determine whether the statement as to weekly income, if false, increased

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the risk. The inquiries as to the plaintiff's indebtedness were not sufficiently connected with his income to show that they were not rightly excluded in the discretion of the trial judge.

2. The policy required that, in case of an accident, written notice thereof should be sent to the defendant "as soon as may be possible." There is no substantial difference in the meaning of these words and "forthwith" or "immediate" which, as used in similar contracts, have been often before the courts. They mean in such connection that due diligence shall be used to send the notice with reasonable promptness. *Smith* v. *Scottish Union Ins. Co.* 200 Mass. 50, and cases cited. *Bennett* v. *Ætna Ins. Co.* 201 Mass. 554. *Cady* v. *Fidelity & Casualty Co.* 134 Wis. 322. *Edgefield Manuf. Co.* v. *Maryland Casualty Co.* 78 S. C. 73, 79. The plaintiff was injured at a lonely camp in New Brunswick, on the early morning of November 18, by such severe burning of one hand as to require its amputation two days later. He was far from home and kindred. The notice was sent on the fourth day thereafter. It was sufficiently favorable to the defendant to leave it to the jury to say, in view of these circumstances and the inferences reasonably to be drawn from them under the apt and comprehensive instructions given, whether the notice was sent as soon as was possible. *Smith* v. *Scottish Union Ins. Co.* 200 Mass. 50.

There is no ground for exception to the instruction given respecting the authority of Wood,* for the jury were plainly told that the plaintiff could not recover, if no notice was given other than the two notices to Wood. The promptness with which the defendant's agent appeared at the hospital, where the plaintiff was, may have given color to the suggestion that Wood acted as forwarding agent of an earlier notice, and if he did the plaintiff was entitled to the benefit of it.

3. The occupation of the plaintiff was described in the schedule of warranties as "proprietor," his business as "Manufacturer of infusorial earth," and his duties as "office duties and travelling only." The policy provided that "if the insured is injured fatally or otherwise in any occupation classified by this corporation as more hazardous than that stated in the Schedule of Warranties,

* Wood was the insurance agent through whom the policy was obtained.

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the corporation's liability shall be only for such proportion of the principal sum . . . as the premium paid by him will purchase at the rate fixed by the corporation for such more hazardous occupation, but claims for injuries sustained while engaged in games or sports for recreation, or while performing duties about the residence, shall not be prorated hereunder." It is not denied that he was engaged in the business described nor that he was proprietor nor that generally his duties were as set forth. But the facts relied upon by the defendant are that for two or three weeks before the accident the plaintiff had been at his works near St. John, New Brunswick, living in a cottage or camp erected for the use of himself and family, and that, while there, he had directed and assisted in making experiments with infusorial earth, which consisted chiefly if not wholly in the use of a small filter press, mixing tripolite with an acid and drying it in a kiln or otherwise and calculating the shrinkage. There was testimony from which it might have been found that substantially all of the manual labor was done by a workman, and the plaintiff testified that he went to the works for rest and recreation, and that whatever he did while there was to this end. The accident may have been found to have happened after all experiments had ended and the laborer had been dismissed, and as the plaintiff was about to return to his home in this Commonwealth. An employee of the defendant, whose duty was to classify its risks, testified, in answer to an hypothetical question embodying in substance the most onerous construction supported by evidence as to what the plaintiff did while at the works, that such acts would undoubtedly place him in a more hazardous classification than that described in the policy; but he also testified without objection that it was the business or employments from which the insured derived his livelihood which determined classification by the defendant. Plainly upon this evidence the judge could not direct a verdict for the defendant. Occupation is a term of broad significance and includes the trade, calling, profession, office, employment or business by which one usually gets his living. It is not incidental, recreatory or even necessary suspension of the performance of regular duty, which constitutes a change of occupation. Vacation expedients differ almost as widely as the temperaments of men.

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The occasional recurrence for diversion or recuperation to tilling the soil does not convert the business or professional man into a farmer. The statesman felling trees for exercise could not thereby be classified properly as a wood chopper by occupation. Where the nature of the employment is narrow and classification is strict and closely subdivided, change from one class of compensated work to another may effect a change, as was held in *Aldrich* v. *Mercantile Mutual Accident Assoc.* 149 Mass. 457. But where comprehensive phraseology is used, a slight variation from daily routine does not rise to the dignity of a change of the main purpose of one's business activity. Cases which support these conclusions are collected in a footnote.*

The judge instructed the jury that if, during the period in question, the plaintiff was actually working about machinery, experimenting, using acids and thus engaged in more hazardous occupation, he was entitled only to such portion of the principal sum insured as the amount paid would buy according to the schedule of the company. The defendant has no ground for complaint in this respect. The instructions upon this branch of the case as to whether the statement of his occupation was false and made with intent to deceive were correct, as has been before pointed out.

4. The defendant has argued several questions of evidence. They might all be summarily disposed of on the familiar principle that having made no offer of proof as to what it expected to prove in response to the general questions excluded, it does not appear to have suffered any injury. But assuming that all answers would have been favorable, no error is disclosed.

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* *Sharp* v. *McHenry*, 38 Ch. D. 427, 450. *In re Haynes*, 15 Ch. D. 42, 54. *Larchin* v. *North Western Deposit Bank*, L. R. 10 Ex. 64. *Union Mutual Accident Assoc.* v. *Frohard*, 134 Ill. 228, 234. *Kentucky Ins. Co.* v. *Franklin*, 102 Ky. 512. *Wildey Casualty Co.* v. *Sheppard*, 61 Kans. 851. *Miller* v. *Travellers' Ins. Co.* 39 Minn. 548. *Simmons* v. *Western Travelers Assoc.* 79 Neb. 20. *Stone* v. *United States Casualty Co.* 5 Vroom, 371. *Schmidt* v. *American Mutual Accident Assoc.* 96 Wis. 304. *Hess* v. *Preferred Masonic Mutual Accident Assoc.* 112 Mich. 196. *Holiday* v. *American Mutual Accident Assoc.* 103 Iowa, 178. *Standard Ins. Co.* v. *Fraser*, 76 Fed. Rep. 705, 709. *In re Vining*, L. R. 10 Eq. 63, 65. *Brodrick* v. *Scale*, L. R. 6 C. P. 98. *Smith* v. *Cheese*, 1 C. P. D. 60. *Ætna Ins. Co.* v. *Dunn*, 138 Fed. Rep. 629.

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The schedule of warranties was made up of printed partial assertions or questions (with two exceptions) followed by blanks. Most of these were filled by written answers. In several instances nothing was written in the blank space. These were in reality questions, although commencing with language appropriate to a declaration, because the graphic form of the printing without punctuation at the end and with a blank space to be filled out indicates an interrogation rather than an assertion. Neither affirmation nor negation can be predicated upon a mere omission under these circumstances. *Nugent* v. *Greenfield Life Assoc.* 172 Mass. 278, 285. *Brown* v. *Greenfield Life Assoc.* 172 Mass. 498, 502.

All other exceptions, not having been argued, are treated as waived.

Exceptions overruled.

BEACH AND CLARRIDGE COMPANY *vs.* AMERICAN STEAM GAUGE AND VALVE MANUFACTURING COMPANY.

Suffolk. March 8, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Contract, What constitutes, Performance and breach. *Damages.*

The following offer was made by one corporation to another and was accepted by the corporation to which it was addressed: "Gentlemen: — I am authorized by our board of directors to offer you the sum of $100,000 for your property on Camden Street in Boston which we are now occupying on a lease, the terms to be as follows: $5,000 cash when signing papers, $5,000 cash on delivery of the deed, remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we shall pay you the sum of $11,000 per year, you to pay interest on the mortgages and taxes and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1908." *Held*, that the offer was not a mere preliminary proposal, but with its acceptance constituted a contract which fixed the rights of the parties, and that it contained a sufficiently definite and certain statement of all the essential terms which the parties then intended to introduce into their contract, and consequently was not too indefinite to be the foundation of a final agreement.

In an action for the alleged breach of a contract to buy certain real estate from the plaintiff for the sum of $100,000, if it appears that the defendant refused to buy

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the property except upon a condition which was not contained in the contract, so that the plaintiff was excused from further performance or offer of performance on his part, but it is admitted that $100,000 was no more than a fair price for the property, *it seems*, that the plaintiff cannot recover more than nominal damages for the failure of the defendant to pay that price for it.

In an action for the breach of a contract to buy from the plaintiff for $100,000 certain real estate, which was subject to a mortgage, the plaintiff alleged that the defendant by conspiracy and combination with the mortgagee made it impossible for the plaintiff to perform his contract. It appeared that the mortgagee refused to extend the mortgage and proceeded to a foreclosure under a power of sale contained in the mortgage, that by the terms of the sale a deposit of $5,000 was required, that the attorney for the plaintiff was the highest bidder and the property was knocked down to him for $65,000, but that he failed to deposit $5,000 in cash and offered instead a cashier's check for that amount, which the auctioneer after consultation with the attorney for the mortgagee refused to accept, that the attorney for the mortgagee was mistrustful in regard to the validity of the check because it had been issued for several weeks and had been used at an injunction trial two weeks before, that the attorney for the plaintiff asked for a suspension of the sale for fifteen or twenty minutes to enable him to get the money on the check, saying that he could get the money at the bank and return within that time, and there was evidence that he could have done so. Thereupon the property was put up again and the only bidders were the attorney for the mortgagee and the attorney for the defendant, and the property was sold to the attorney for the defendant for $60,400, and the attorney for the defendant immediately deposited $5,000 in cash with the auctioneer. *Held*, that the evidence would not warrant a finding that there was any conspiracy between the defendant and the mortgagee to deprive the plaintiff of his rights or disable him from performing his contract, that the defendant had a right to bid at the sale and to acquire the property in the manner that he did for a smaller price than that stipulated in his agreement with the plaintiff, that the mortgagee's attorney and the auctioneer had a right to refuse to receive a cashier's check instead of actual money, especially under the circumstances, and also had a right to refuse to give the plaintiff's attorney time to procure the money on the check. Whether the facts could be made the ground of a bill of equity to avoid the sale was not before the court.

CONTRACT for the alleged breach of an agreement to buy from the plaintiff a parcel of land with the buildings thereon numbered from 208 to 220 on Camden Street in Boston for the price of $100,000, it being alleged that the offer to buy the property was made in writing by the defendant on November 25, 1903, and was accepted orally by the plaintiff on that day, and that subsequently the plaintiff confirmed and repeated its acceptance in a letter dated December 1, 1903, copies of the writings being attached to the declaration as printed below. The first count alleged that the defendant shortly after the plaintiff's acceptance of the defendant's offer, and while the plaintiff was ready and able to perform its part of the contract, notified the plaintiff

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that it repudiated the contract, and refused to perform it according to its terms, and the second count alleged that the defendant by conspiracy and combination with the mortgagee of the property made it impossible for the plaintiff to perform its contract. Writ in the Supreme Judicial Court dated April 8, 1904.

The writings above referred to, of which copies were attached to the declaration, were as follows:

"Boston, Mass. Nov. 25, 1903.

"Messrs. Beach & Clarridge Co.,
Boston, Mass.

"Gentlemen: — I am authorized by our Board of Directors to offer you the sum of one hundred thousand dollars ($100,000) for your property on Camden Street in Boston which we are now occupying on a lease, the terms to be as follows: —

"$5000.00 cash when signing papers,

"$5000.00 cash on delivery of the deed.

"Remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we shall pay you the sum of $11,000 per year, you to pay interest on the mortgages and taxes and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1903.

"Respectfully submitted,
"American Steam Gauge & Valve Mfg. Co.
By Ralph B. Phillips
Sec'y."

"Boston, Dec. 1st, 1903.

"American Steam Gauge & Valve Co.,
212 Camden St.,
Boston, Mass.

"Gentlemen: — In reply to your letter of Nov. 25th 1903 — offering us a sum of $100,000^{00} (one hundred thousand dollars) for our property, which you now occupy, I am authorized by our Board of Directors to accept your offer on the terms proposed by

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you and we hold ourselves in readiness to sign formal agreements and make a deed of the property.

"Yours truly —

"Beach & Clarridge Co. of Boston
by M. Douglas Flattery
Counsel for Beach & Clarridge Co."

The case was tried before *Hammond*, J., who, upon a motion of the defendant, ruled that there was nothing to go to the jury and ordered a verdict for the defendant. Thereupon the justice reported the case for determination by the full court of the question whether the plaintiff was entitled to go to the jury. If he was not, there was to be a judgment on the verdict; otherwise, there was to be a new trial.

The facts in regard to the foreclosure sale, referred to in the opinion, which were relied upon by the plaintiff in support of its second count, were as follows:

The foreclosure sale was advertised in the usual manner, and display advertisements also were inserted in the Boston Herald and a trade paper. The sale was advertised to take place on January 16, 1904, but was adjourned, pending the hearing upon a bill in equity to enjoin the foreclosure, to January 30, 1904, at which time the sale was made by one Hatch, a licensed auctioneer. Representatives of the plaintiff, of the defendant, and of the mortgagee, Mr. McLeod, an attorney at law acting for the defendant, and some casual bystanders were the only persons present. The terms of sale required $5,000 down, and the balance within ten days thereafter. Upon the property being put up for sale the only bidders were Mr. Flattery, on behalf of the plaintiff, and Mr. McLeod. The property was finally declared sold to Mr. Flattery for $65,000. Mr. Flattery presented a cashier's check for that amount. After some conference the auctioneer refused to take the check, whereupon Mr. Flattery asked for a suspension of the sale for fifteen or twenty minutes to enable him to get the money on the check, stating that he could get the money at the bank and return within that time. There was evidence tending to show that if this request had been granted the money could have been obtained within that time. There was also evidence tending to show that, according to the custom

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of the banks in Boston, the money could have been obtained upon this check by any person to whom it was indorsed upon being identified, and that the money would be paid on the check solely upon reliance on the drawer of the check and without regard to the financial responsibility of the payee or bearer, and without regard to the lapse of time since the date of the check. There was evidence tending to show that Mr. Gleason, the attorney for the mortgagee, was mistrustful of the validity of the check, because it had been issued several weeks, and because it was the same check which was used at the injunction trial two weeks before, and also because he doubted the good faith of Mr. Flattery. There was also evidence tending to show that upon the presentation of the check, it appearing that there was some doubt about it being accepted, Mr. McLeod insisted upon the property being put up again, and repeatedly called upon the auctioneer to put the property up again; and that Mr. Gleason, when asked by the auctioneer what he should do about accepting the check, said, "It is up to you and if you take the check we shall look to you for the money." The property was put up again, and the only bidders were the representative of the mortgagee and Mr. McLeod, and the property was finally sold to Mr. McLeod for the sum of $60,400, who immediately deposited $5,000 cash with the auctioneer.

H. E. Warner, for the plaintiff.

G. V. Phipps, (*W. A. Webster* with him,) for the defendant.

SHELDON, J. The defendant's written offer of November 25, 1903, and the plaintiff's acceptance of that offer, made by a vote of its directors and communicated to the defendant on the same day, as the jury might have found, were enough, if sufficiently definite in its terms, to constitute a binding contract between the parties. *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 196 Mass. 72, 82. *Howe* v. *Watson*, 179 Mass. 30, 39. *Lydig* v. *Braman*, 177 Mass. 212, 218. *Doherty* v. *Hill*, 144 Mass. 465, 468. *Sanborn* v. *Flagler*, 9 Allen, 474. But the offer was also accepted in writing by the plaintiff's letter of December 1; and the plaintiff had, as stated in *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.*, *ubi supra*, the right to rely upon each one of these acceptances.

The defendant's contention is that its offer was upon its face

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intended merely as a preliminary proposal or step in the negotiations which contemplated the making of a final contract by which alone the parties were to be bound, as in *Lyman* v. *Robinson*, 14 Allen, 242, and *Sibley* v. *Felton*, 156 Mass. 273. But the offer before us does not appear to be one of that kind. It was not a bare preliminary proposal, expected only to be the basis of a future agreement, as in *Edge Moor Bridge Works* v. *Bristol*, 170 Mass. 528, and *Benton* v. *Springfield Young Men's Christian Association*, 170 Mass. 534. We cannot say that it is shown either by the language of this offer and of its acceptance, or by the conduct of the parties, that they purposed to be bound only by a subsequent formal agreement, or that they intended such a subsequent formal agreement, if it should be made, to be anything more than a convenient memorial or record of the bargain which they had already concluded. *Jones* v. *Daniel*, [1894] 2 Ch. 332. *Mississippi & Dominion Steamship Co.* v. *Swift*, 86 Maine, 248. *Bryant* v. *Ondrak*, 87 Hun, 477. This case resembles rather *Bonnewell* v. *Jenkins*, 8 Ch. D. 70, and *Rossiter* v. *Miller*, 3 App. Cas. 1124. The rights of the parties were fixed by the offer and acceptance; and their power by subsequent mutual agreement to vary or add to the terms of their bargain is not material to this question. It does not appear that there were other conditions of an intended agreement beyond those expressed in the offer and acceptance, which were still under negotiation, and without the settlement of which the parties did not intend to conclude any agreement under the doctrine stated by Lord Selborne in *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, 323. It cannot be said as matter of law that the minds of these parties had not met upon a completed contract.

Nor was the defendant's offer too uncertain and indefinite to be the foundation of a final agreement. It contemplated the renewal or extension of the first mortgage, of course upon its present rate of interest and other terms and conditions. The provision that it should be placed "for a term of years" is not too indefinite; it may be a question of law whether the words "a term of years" would be satisfied by a term of one year or would call for at least two years; but such a question of law, which would be decided in accordance with the actual intent of the parties, as shown by the words used, does not make the stip-

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ulation too indefinite for enforcement. The amount to be paid on the first mortgage must be sufficient to procure its extension, that is, must be satisfactory to the mortgagee. It must be ascertained by agreement between the plaintiff and the mortgagee, and the plaintiff must undertake the burden of coming to an agreement with the mortgagee. But there is nothing impossible in this; the amount would thus become certain, and *id certum est quod certum reddi potest.* But nothing was left here to be settled by negotiations between the contracting parties, as in *May* v. *Thomson*, 20 Ch. D. 705, *Sands & Maxwell Lumber Co.* v. *Crosby*, 74 Mich. 313, and *Commercial Telegram Co.* v. *Smith*, 47 Hun, 494. The amount of the second mortgage would then be made certain by a simple computation. The stipulation that the defendant should pay to the plaintiff only $11,000 each year, out of which the interest on the mortgages and the taxes should be paid by the plaintiff and "the balance applied to the purchase price of the property," which was to be secured by the second mortgage, made the term of that mortgage sufficiently certain; and the time for the carrying out of the agreement would be a reasonable time, which of course is not too uncertain or indefinite. We accept fully the rule that we should have here no enforceable agreement, as distinguished from mere preliminary negotiations, unless we could find a sufficiently definite and certain statement of all the essential terms which the parties then intended to introduce into their agreement; but we do not find that this offer was deficient in any of the particulars which have been pointed out by the defendant. See *Crawford* v. *Weston*, 131 Mass. 283; *Raymond* v. *Rhodes*, 135 Mass. 337; *Marble* v. *Standard Oil Co.* 169 Mass. 553.

The defendant has argued that the plaintiff made no acceptance of its offer. But this was plainly a question of fact for the jury.

There was evidence that the defendant on December 15 "formally and definitely stated to the plaintiff that it would decline to carry out any agreement or to complete any purchase of the property in question unless a three years' extension of the existing mortgage should be obtained." There can be no doubt that this was a breach by the defendant of its agreement, which operated to excuse the plaintiff from any further performance or

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offer of performance on its part. *Smith* v. *Greene*, 197 Mass. 16, 18. *Clark* v. *Gulesian*, 197 Mass. 492, 494. *Earnshaw* v. *Whittemore*, 194 Mass. 187. *Foternick* v. *Watson*, 184 Mass. 187, 193. *Howland* v. *Leach*, 11 Pick. 151. To the same effect are *Hinckley* v. *Pittsburg Bessemer Steel Co.* 121 U. S. 264, *Ripley* v. *M'Clure*, 4 Exch. 845, and *Cort* v. *Ambergate Railway*, 17 Q. B. 127. But as it was not questioned at the trial that a fair price for the property was $100,000, the same amount which was to have been paid by the defendant, it is difficult to see how the plaintiff on its first count can recover more than nominal damages.

And as to the second count, we are of opinion that the verdict was rightly ordered. The mortgagee refused to make such an extension of the mortgage as was desired, and finally sold the property by public auction under the power of sale contained in the mortgage, for an amount which apparently was only slightly, if at all, more than enough to provide for the payment of that mortgage and the intervening charges. The evidence would not have warranted a finding that there was any conspiracy between the defendant and the mortgagee to deprive the plaintiff of its rights or to disable it from performing its contract. The mortgagee did nothing more than it had a right to do; and the defendant committed no further breach of its agreement with the plaintiff by availing itself of the opportunity offered by the mortgagee's action to secure the property for its own benefit, if we assume that this was what it did do, for a smaller price than that stipulated in its agreement with the plaintiff.

Nor did the defendant violate any contractual obligation to the plaintiff by desiring even with insistence that the property should be put up again by the auctioneer when, after it had been knocked down to Mr. Flattery the plaintiff's representative, he failed to secure the bargain by making the required deposit of $5,000 in cash. The mortgagee's attorney and the auctioneer had the right to refuse to receive a cashier's check instead of actual money, especially under the circumstances stated in the bill of exceptions, or to give Mr. Flattery time to procure the money thereon. Whether these circumstances could be made the ground of a bill in equity to avoid the sale is not before us. The decisions of this court are decisive against the plaintiff

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here. *Randall* v. *Hazleton*, 12 Allen, 412. *Bradley* v. *Fuller*, 118 Mass. 239. *O'Callaghan* v. *Cronan*, 121 Mass. 114. *Groustra* v. *Bourges*, 141 Mass. 7. *Roth* v. *Adams*, 185 Mass. 331. *Taylor* v. *Finnigan*, 189 Mass. 568. The defendant was not bound to attempt to interfere with the mortgagee's foreclosure, and had a right to buy at the sale under the power.

But as a general verdict was directed for the defendant, in accordance with the terms of the report there must be a new trial.

So ordered.

GOSS PRINTING PRESS COMPANY *vs.* CHARLES E. TODD.

Suffolk. March 8, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Attorney at Law. Practice, Civil, Appeal, Discretion of court.

A petition, filed in the Superior Court, alleging that an attorney at law, who was a member of the bar of the Commonwealth, while acting as attorney for the petitioner had collected $8,000 due to the petitioner and had failed to pay it over to him because, as he admitted, he had lost it in speculation on his own account, and that the attorney had promised to pay the petitioner $5,000 of that amount but had failed to keep his promise to do so, and praying for an "order and decree" that the attorney should pay to the petitioner $5,000 and interest and costs and, in default thereof, that he should "be punished according to law as in such cases made and provided, and for such other and further relief as" the court might "deem just and proper," is a proceeding upon the law side of the court, and upon an appeal from an order dismissing the petition questions of discretion cannot be considered.

A petition in the Superior Court, which alleges that an attorney at law, who was a member of the bar of the Commonwealth, while acting as attorney for the petitioner collected $8,000 due to the petitioner and failed to pay it over to him because, as he admitted, he had lost it in speculation on his own account, and that the attorney promised the petitioner to pay him $5,000 of that amount but failed to keep his promise, and which prays for an "order and decree" that the attorney shall pay to the petitioner $5,000 and interest and costs and, in default thereof, that he shall "be punished according to law as in such cases made and provided, and for such other and further relief as" the court may "deem just and proper," is not recognized by the statutes as an authorized proceeding for the collection of such a debt, and, while the court, as a part of its power of regulation of the conduct of its own officers, might make an order for the payment into court of money collected by an attorney and not paid over, and might punish the attorney for contempt if he disobeyed the order, the making of such an order would be an exercise of discretion, from a refusal to exercise which no appeal lies.

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PETITION, filed in the Superior Court for the county of Suffolk on May 18, 1908, and supported by affidavits, against an attorney at law, alleging among other things the respondent's relation of attorney to the petitioner existed through a substantial period of time and that he was a member of the bar of the Commonwealth, that he collected as such attorney large sums of money from the petitioner's debtor and failed to pay them over to the petitioner, that he admitted to the petitioner's agents that he had lost in speculation on his own account $8,000 of the sums so collected and that he had promised to repay the petitioner $5,000 and had failed to do so though some years had elapsed. The prayers of the petition are quoted in the opinion.

An order of notice was issued to the respondent to appear on May 27, 1908, and "show cause, if any, why said petition should not be granted."

The respondent demurred, specifying as grounds of demurrer an adequate remedy at law and want of equity. The demurrer was heard by *Dana*, J., who filed a memorandum, containing the following rulings:

"The demurrer must be overruled, for it is not sustainable upon the grounds stated therein. The petition is not a petition in equity, and is not objectionable, therefore, as failing of equity.

"The court is of the opinion, however, that the granting of the prayer of the petition is not a matter of right, but of discretion, and that the court in conformity with its past practice, must refuse to entertain jurisdiction of the petition. A counsellor at law may be disbarred for misappropriation of his client's funds, is liable to a forfeit of five times the interest thereon for failure to pay over the same upon demand, and upon arrest upon execution is not entitled to the benefit of the poor debtor's oath. It seems accordingly, to the court, that the client will be amply protected, if he is confined to his present usual method of redress; and the public interests are fully provided for by disbarment proceedings.

"It is true, that, in England, and in some other jurisdictions, a different rule prevails; but it has never been the rule here; and, after consultation with my associates, I am of the opinion that the prior practice of the court should be adhered to. . . .

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Here there has been no suit at law, or judgment, or execution, or return thereon."

The demurrer accordingly was overruled, and the petition was dismissed. The petitioner appealed.

T. W. Proctor, for the petitioner.

L. L. Green, for the respondent.

KNOWLTON, C. J. The prayer of the petition in this case is as follows: "Wherefore, on the facts set forth in this petition, upon the affidavits and statements hereunto annexed, whereby it appears that the said Todd, while acting as attorney for your petitioner, has misappropriated and failed to pay over certain funds collected by him as such attorney, belonging to your petitioner, your petitioner prays for an order and decree of this court, ordering and directing the said Todd to pay to your petitioner, or to its attorneys in this present proceeding, the sum of $5,000 together with the interest thereon from the fifteenth day of November, 1903, and all the costs and disbursements; that, in default thereof, the said Todd be punished according to law as in such cases made and provided, and for such other and further relief as this honorable court may deem just and proper." The case comes before us on an appeal from an order dismissing the petition. There was a hearing on a demurrer to the petition, which was overruled because it was put upon the ground that the petition was in equity and that there is no jurisdiction of such a case in equity, when in fact the proceeding is not in equity. As this is an appeal on the law side of the court, it brings before us only questions of law. Questions of discretion cannot be considered. *Commonwealth* v. *National Contracting Co.* 201 Mass. 248.

Other parts of the petition, as well as the prayer, show that it was brought by a creditor in his individual interest, to collect a debt from an attorney, for money which had been collected and misappropriated by the respondent. The statutes provide remedies for such creditors. Not only may a suit be brought as for other debts, but the attorney is liable to pay as a forfeiture five times the interest of the money which he has unreasonably neglected to pay over, (R. L. c. 165, § 49,) and he is liable to arrest upon the execution, and is not permitted to take the oath for the relief of poor debtors. R. L. c. 168, §§ 17, 52.

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The mode of procedure adopted in this case is not recognized by the statutes as an authorized measure for the collection of such debts.

If the proceedings had been commenced in the interest of public justice, for the promotion of honesty and fidelity in the practice of law by attorneys as officers of the courts, there would have been sufficient reason in the facts alleged for the subjection of the respondent to discipline by the court. R. L. c. 165, § 44. Proceedings for the removal from the bar, or for suspension from the bar, of lawyers guilty of such misconduct, are authorized by the statutes and entertained by the courts. But it is unusual and irregular to allow a creditor, in his own interest, to appeal to this jurisdiction of the court as a means of collecting a debt.

We assume that a court, as a part of its power of regulation of the conduct of its own officers, might make an order for the payment into court of money collected by an attorney and not paid over, and might punish the attorney for contempt if he disobeyed the order. *Jeffries* v. *Laurie*, 27 Fed. Rep. 195. See *In re Dudley*, 12 Q. B. D. 44. To do this would be an exercise of discretion which the court might well refuse, leaving the public interest to be protected by proceedings for disbarment, and the interests of the creditor by proceedings of a different kind.

So far as we are aware, the discretion of the court has never been so exercised in Massachusetts, and such an exercise of it is very uncommon elsewhere. The only case of the kind that has come to our knowledge is that cited above from a federal court.

There was no error of law in the decision of the Superior Court, and we have no power to revise its exercise of discretion.

Judgment affirmed.

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JOSIAH H. BENTON, JR., & another, trustees, *vs.* GEORGE F. WILLIAMS.

Suffolk. March 8, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Landlord and Tenant, Tenancy at sufferance, Tenancy at will.

Where a lease of real estate contains a stipulation for the payment, for such further time after the expiration of the term of the lease as the lessee shall continue to occupy the premises, of the same rent at the same periods as are provided for during the term of the lease, a mere retaining of possession by the lessee after the expiration of the term of the lease, without any agreement expressed or fairly inferable from all the circumstances, makes him a tenant at sufferance.

Statement by RUGG, J., of the nature and incidents of tenancy at sufferance.

Where a lease of real estate contains a stipulation for the payment, for such further time after the expiration of the term of the lease as the lessee shall continue to occupy the premises, of the same rent at the same periods as are provided for during the term of the lease, evidence tending to show continued occupation by the lessee after the expiration of his term with the knowledge and consent of the lessor, and the payment and receipt of rent at the same rate and upon the same rent days as were required by the lease, is sufficient to warrant a finding of the existence of an agreement for a tenancy at will.

CONTRACT for rent. Writ in the Municipal Court of the City of Boston dated October 20, 1906.

On appeal to the Superior Court, the case was heard by *Raymond*, J., without a jury. The facts are stated in the opinion.

At the close of the evidence, the plaintiffs asked the presiding judge to rule as follows:

"1. Upon all the evidence the defendant was a tenant at will and the plaintiffs as a matter of law are entitled to recover.

"2. The defendant remaining in possession of the premises leased to him after the termination of his lease and rent being paid quarterly by the defendant and accepted by the plaintiffs after the termination of said lease, created as a matter of law a tenancy at will and the plaintiffs were entitled to a written notice to terminate the tenancy, as provided by statute.

"3. Upon all the evidence the plaintiffs are entitled to a verdict."

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The defendant requested the following rulings:

"1. After the expiration of the lease the defendant remained on the premises as a tenant at sufferance.

"2. After the expiration of the lease the mere payment of a quarter's rent by the defendant did not change his tenancy at sufferance to a tenancy at will. . . .

"4. There must have been an acknowledgment on each side of a tenancy at will or acts constituting what is equivalent thereto on the part of both the plaintiffs and defendant of the intention to consider the defendant a tenant at will, in order to change the tenancy at sufferance to a tenancy at will.

"5. Upon the facts proved the plaintiffs cannot recover.

"6. The notice of January 30, 1905, did not change the tenancy at sufferance to a tenancy at will. . . .

"8. The notice as given on January 30, 1905, if necessary, was sufficient notice of intention to quit from the defendant to the plaintiffs."

The presiding judge refused to rule as requested by the plaintiffs, gave the rulings requested by the defendant, and further ruled "that the defendant did not assent to become a tenant at will and the fact of holding over and payment of rent did not constitute him a tenant at will," and "that, as a matter of law, the defendant was not a tenant at will but was a tenant at sufferance, and not liable to pay rent for the same beyond such time as he actually occupied or detained them, to wit, beyond the month of April, 1905; and that as a matter of law, the facts would not warrant a finding for the plaintiffs."

Accordingly, the judge found for the defendant; and the plaintiffs alleged exceptions.

G. C. Dickson, for the plaintiffs.

J. A. Halloran, for the defendant.

RUGG, J. This action of contract for the recovery of rent was heard by a judge of the Superior Court without a jury. The material facts were not in dispute. The defendant was the tenant of certain offices in a building belonging to the plaintiffs, under a written lease for a term of three years, which expired on August 31, 1904, and which provided among other matters that the rent reserved was payable quarterly, on the first days of December, May, June and September, and that such rent

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should be paid at the same dates for such further time beyond the term as the tenant should hold the premises. After the expiration of the term, the defendant continued to occupy the premises demised in the same way as before the expiration of the lease, and on December 1, 1904, paid to the plaintiffs the quarter's rent from September 1, 1904, to December 1, 1904. Other than this payment, no communication passed between the parties until January 30, 1905, when the defendant gave the plaintiffs written notice that he should quit the offices occupied by him "at the termination of" his "next three months' tenancy on the first of June." Receipt of this notice was acknowledged in writing by the plaintiffs, who expressed regret at losing the defendant "as tenant." On February 27, 1905, the defendant wrote again to the plaintiffs, stating that he had found that in giving his notice of intention to quit he had made a mistake in putting the end of the three months, to which notice was given, as the first of June instead of the first of May, the latter being the date when he expected to leave. This statement not being acceded to by the plaintiffs, on the following day the defendant wrote asserting that he was a tenant at sufferance, and that hence the notice already given was sufficient. On or about March 1, 1905, the defendant paid the rent for the quarter ending on that day, and on April 29 that for the month of April. He vacated the premises before May 1, and this action concerns the rent for the month of May.

The trial judge ruled that upon these facts, as matter of law, the plaintiffs were not entitled to recover, and that the facts would not warrant a finding for the plaintiffs, and that the defendant was a tenant at sufferance, and not a tenant at will. He decided the case as matter of law, and did not submit it to himself as the tribunal authorized to pass on the facts. The correctness of these rulings is challenged. The question thus presented for determination is not whether upon all the evidence a general finding by the magistrate for the defendant might be supported, but whether the rulings of law made were correct. The trial judge did not undertake to find the facts and report questions of law, nor is the case presented by appeal or otherwise upon an agreed statement of facts, nor is it a suit in equity. In such cases the points for decision might be different. *Cun-*

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ningham v. *Commonwealth Ins. Co.* 200 Mass. 333. *Electric Welding Co.* v. *Prince*, 200 Mass. 386, 392.

The mere holding over, without any agreement, expressed or fairly inferable from all the circumstances, by a tenant after the expiration of a written lease, which contains a stipulation as to the payment of rent beyond the term, constitutes him a tenant at sufferance. *Warren* v. *Lyons*, 152 Mass. 310. *Edwards* v. *Hale*, 9 Allen, 462. This has always been the law of this Commonwealth, and appears to prevail generally, although it is held in New York that the lessor may at his election consider such an one a tenant at will. *Haynes* v. *Aldrich*, 133 N. Y. 287. *Delano* v. *Montague*, 4 Cush. 42. A tenant at sufferance has no estate or title, but only a naked possession, without right and wrongfully, stands in no privity to the landlord, at common law is not liable for rent, is not entitled to notice to quit, and has no action against his landlord or other person entitled to possession, if himself, his family and goods are ejected without unnecessary force. He differs from a trespasser or disseisor only in that his entry upon the premises is not unlawful. His continued occupancy is due wholly to the laches or forbearance of the person entitled to possession in not evicting him. He may leave at any time without notice or liability. No contractual relation (apart from statute) arises out of a possession of such a character. *Curtis* v. *Galvin*, 1 Allen, 215. *Kinsley* v. *Ames*, 2 Met. 29. *Moore* v. *Mason*, 1 Allen, 406. *Kelly* v. *Waite*, 12 Met. 300. *Pratt* v. *Farrar*, 10 Allen, 519. *Merrill* v. *Bullock*, 105 Mass. 486. *Low* v. *Elwell*, 121 Mass. 309. *Appleton* v. *Ames*, 150 Mass. 34, 44. *Mentzer* v. *Hudson Savings Bank*, 197 Mass. 325.

While a tenancy at sufferance can be converted into a tenancy at will only by a contract, such a contract may be inferred from circumstances as well as expressed by formal agreement. *Porter* v. *Hubbard*, 134 Mass. 233, 238. The continued occupation by a tenant after the expiration of his term with the knowledge and consent of his landlord and the payment and receipt of rent at the same rate and upon the same rent days as were required by the lease is evidence sufficient to show an agreement for a tenancy at will. A possession, recognized by the parties as based upon such stated rent payments, is ordinarily inconsistent

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with a mere occupancy devoid of any substantial right on the part of the tenant, which characterizes a tenancy by sufferance. But for R. L. c. 129, § 3, which imposes upon a tenant at sufferance liability for rent during his actual detention of the premises, the payment of rent would be so wholly at variance with the legal conception of a tenancy at sufferance as to require a ruling that it was conclusive evidence of a tenancy at will. *Howard* v. *Merriam*, 5 Cush. 568, 571. *Russell* v. *Fabyan*, 34 N. H. 218, 223. *Emmons* v. *Scudder*, 115 Mass. 367. *Dorrell* v. *Johnson*, 17 Pick. 263, 267. See *Sallinger* v. *Smith*, 192 Mass. 317. But in view of that statute the evidence does not seem quite so conclusive as to warrant a ruling as matter of law that the defendant became a tenant at will. It was a fact to be determined in the light of all the testimony and the attendant circumstances whether a contract existed between the parties by fair implication. But the several rulings, to the effect that a finding for the plaintiffs was not warranted, were wrong.

Exceptions sustained.

THOMAS M. ANDERSON *vs.* THOMAS H. MARRINAN & another.

Middlesex. March 8, 9, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

At the trial of an action against the proprietor of a machine shop for personal injuries received by an employee caused by a spark flying from the pin of a tube expander into his eye when he struck the pin with his hammer, where there is evidence tending to show that the head of such a pin usually is not hardened, but is left soft, and that, when struck with a hammer used for such work, if properly annealed, it will not splinter but will "upset or roll over," and the defendant admits that the pin of the expander furnished to the plaintiff had been hardened, the question whether the defendant negligently furnished to the plaintiff a defective tube expander should be left to the jury.

A machinist, in entering the employ of the proprietor of a machine shop, does not assume the risk of injury due to a tube expander, which is furnished to him by his employer, being defective because it is too hard and because it therefore causes sparks to fly from it when it is struck with such a hammer as ordinarily is used for the purpose, if it appears that such a defective condition could not be discovered by visual inspection.

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TORT for personal injuries alleged to have been received by the plaintiff while he was in the defendants' employ and to have been due to a defective condition of a tube expander which was furnished to him to work with. Writ in the Superior Court for the county of Middlesex dated January 27, 1905.

There was a trial before *Aiken*, C. J. The plaintiff testified that he was forty-one years old, that he had been a machinist for fifteen years or more, and that he had used tube expanders before, and had used the particular one which caused the accident three times; that on October 19, 1904, he was ordered by the defendants' superintendent to go the next morning at about three or four o'clock to a certain factory and expand the tubes of a boiler; that when he went to the shop of the defendants about three o'clock in the morning of October 20, before the shop was open, to get his tools, he found this tube expander lying beside his own box of tools inside the shop; that it was of the requisite size, and the only one of that size in the shop so far as he knew; that the defendants had a tool room which was locked at night; that "the practice was when a tool was wanted they asked the boss for it"; that the plaintiff took the tube expander and proceeded to the shop where the boiler was, and "rolled," i. e. expanded, a couple of boiler tubes, "the process being to strike with his machinist's hammer on the head of the pin of the tube expander, which, being tapering toward the other end, was thereby forced farther into a cylinder which formed part of the tool and was inserted in the end of the tube, and by being forced in operated to push outward some rolls which were inserted in the cylinder, and so expanded the end of the boiler tube"; that he started to roll a third tube and struck the head of the pin a square blow with his hammer when a flash occurred, and one or more small pieces of steel broke and flew from the head of the pin and pierced his left eye; that the tube expander showed bright spots where clipped off; that he subsequently tried to file the head of the pin, but the file would not "touch it" and that this indicated that it was very hard; that the defendant Marrinan stated after the accident in the presence of the plaintiff and others that he bought the tube expander hardened; that the plaintiff did not know at the time of the accident that the tube expander was hardened and could not tell by looking at it

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whether it was hard or soft; that he had never seen tools when pounded on flash and break off as this one did; that he had never worked with them in the dark; that he had used cold chisels and prick punches many times, and that the parts of them on which he pounded were of soft steel; that he had worked on lathes, turning and boring, and turning shafting, and used all kinds of tools like an ordinary machinist.

There also was testimony by experienced machinists that the regular machinist's hammer is hard and that if a hardened piece of steel is struck with it the result is likely to be a flash and a flying off of a piece of steel with sufficient force to pierce the flesh or eye; that if the steel pounded on is annealed it will "upset" or roll over, but not fly off; that the process of annealing is by heating the steel red hot and letting it cool gradually without water; that the head of the pin of a tube expander is not usually hardened and should be soft; that the head of a tool pounded on becomes hammer-hardened from constant use, that is, its temper is increased by striking with a hammer; that the method of testing the temper of steel is by filing it, and if the file does not "touch" the steel it is hard and brittle.

At the close of the evidence for the plaintiff the presiding judge ordered a verdict for the defendants on the ground that the plaintiff assumed the risk of the accident as one of the risks of his employment; and the plaintiff alleged exceptions.

A. F. Converse, for the plaintiff.

J. Lowell & J. A. Lowell, for the defendants.

BRALEY, J. It would have been competent for the jury to find from the testimony of the experienced machinists called by the plaintiff that the head of the pin of a tube expander is not usually hardened, but left soft, and that when struck with a hammer used for such work, if properly annealed it will "upset or roll over," but will not splinter, nor fly. The defendants, having engaged to provide suitable appliances, admitted that the expander furnished had been hardened, and the inference properly could have been drawn, that because of this condition it had been rendered brittle and unsuitable for the plaintiff's use. It was while the plaintiff was using this defective expander in the usual course of his work to enlarge a boiler tube, that a small piece of steel flew from the head, destroying the sight of his left eye.

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But, if there was evidence of the defendants' negligence, they endeavor to retain the verdict ordered in their favor upon the ground that the plaintiff assumed the risk. It often has been decided that a servant does not assume the risk of defective ways, works or machinery whether at common law or under R. L. c. 106, § 71, unless the defects are either known, or obvious. *Jellow* v. *Fore River Ship Building Co.* 201 Mass. 464. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. If believed, the plaintiff's evidence would have warranted a finding that the defective condition of the expander could not have been discovered by visual inspection, and that, although he was a machinist familiar with the working of iron and the ordinary use of steel tools, he never in his previous experience had observed a piece to break from them, or a flash, followed by a flying spark of steel, upon their being struck with a hammer when in use, until the accident. In entering into the defendants' employment, he moreover had the right to rely upon the assumption, that reasonably safe appliances would be provided, and to what extent, if at all, his previous general knowledge and the appearance of the expander should have led him as an ordinarily prudent man to test the hardness of its head before using it, was a question of fact for the jury. If the plaintiff assumed the risk of dangers incident to the business, he did not as matter of law assume risks of which, it could have been found, he neither had any knowledge nor any reasonable cause to anticipate. *Jellow* v. *Fore River Ship Building Co.*, *ubi supra.*

We are accordingly of opinion that the case should have been submitted to the jury under appropriate instructions.

Exceptions sustained.

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ALFRED W. BERRY *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY & trustee.

Suffolk. March 9, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, In railroad yard, Fellow servant. *Railroad*. *Agency*. *Evidence*, Relevancy, Competence.

Where a railroad company operates a switching yard jointly with another railroad company under a contract by whose terms the yard employees are employees of both companies, and all employees while in the yard are put under the immediate supervision and control of one who is joint agent of both companies, a baggageman, who is in the employ of one of the companies only and who has no knowledge of the contract between the two companies nor any notice or knowledge that he is under the direction or control of any one acting either for the other company or for the two companies jointly, is not affected by the provisions of the contract, and the joint employees of the two companies are not his fellow servants in any such sense as to bar recovery on his part for injuries resulting to him from their negligence.

At the trial of an action against a railroad company by one who, while in the employ of another railroad company as baggageman, lost his hand by its being caught between two cars which he was attempting to couple in a switching yard jointly operated by the two companies, there was evidence tending to show that the plaintiff, who previously had been in the yard only six times, had been ordered in the early morning while it still was dark by the conductor of the train, on which he was to work, to couple two cars to an engine, that at the time there were other cars to be added to the train, that while he was obeying the order some sleeping cars were backed down by a switching engine with unusual force against the cars which the plaintiff was coupling, that no one was upon the forward part of the sleeping cars as they proceeded and no means were taken to warn the engineer of the switching engine that he should stop or "slow down" because of the cars which the plaintiff was coupling; and there was no evidence that it was the practice to give to the trainmen notice of the approach of cars about to be coupled to a train. *Held*, that the questions whether the plaintiff was in the exercise of due care, whether he assumed the risk of the injury, and whether his injury resulted from negligence of the members of the switching crew, were for the jury.

At a trial of an action against a railroad company by a baggageman in the employ of another railroad company for personal injuries alleged to have been caused by reason of negligence of a switching crew in pushing cars with unusual force against cars which the plaintiff was coupling in a railroad yard operated jointly by the two companies, where it appears that the plaintiff was a comparative stranger in the yard and where the negligence of the switching crew complained of was the backing down of the cars without any means being adopted to tell the engineer of the switching engine of the near approach to the cars where the plaintiff was working, it is proper to exclude a question, asked by the defendant of the joint agent of the yard, "Under the practice there, what was the method whereby

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the men were protected in the operation of their work, as to whether they looked out for themselves or otherwise," the defendant's counsel stating that he wished to show that, "in the specific way of doing work there," it devolved upon the plaintiff before going between cars for the purpose of coupling them to look and ascertain whether the shifting engine was at work at the other end of the train.

At the trial of an action against one of two railroad companies, which jointly operated a railroad yard, for injuries resulting to the plaintiff from a switching engine and cars being backed against cars which he was engaged in coupling, it is proper to ask the yardmaster of the yard what steps he took to ascertain whether or not any one of the crew of the train where the plaintiff was working was in a position of danger when the shifting engine was pushing the cars toward the cars where the plaintiff was working.

TORT for personal injuries received by the plaintiff on May 12, 1893, while in the employ of the Fitchburg Railroad Company at Rotterdam Junction, New York, through having his hand caught in a coupling by reason of alleged negligence of a switching crew alleged to have been employed by the defendant as lessee and operator of the West Shore Railroad. Writ in the Superior Court for the county of Suffolk dated July 22, 1893.

The case was tried before *Sherman*, J. There was evidence tending to show the following facts:

At the time of the accident the plaintiff had been a brakeman in the employ of the Fitchburg Railroad Company for three years. In the spring of 1893, he became a baggageman. Previous to the accident, he had been at Rotterdam Junction not more than six times and was not familiar with the conditions there nor with the manner of carrying on business at the yard there.

Between three and four o'clock in the morning of May 12, 1893, while it still was dark, the plaintiff, under orders from the conductor of the train upon which he was to work on its way to Boston, was assisting in coupling an engine to baggage and express cars. Other cars had not yet been attached. While he was so engaged, some sleeping cars, propelled by a switching engine and under the control of a switching crew, were pushed with a force which was unusual against the cars which the plaintiff was coupling and drove them ahead several feet although their brakes were set, and the plaintiff's hand was caught and severed from his arm.

Several witnesses testified that there was no one upon the forward end of the sleeping cars as they approached and that no

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apparent means were taken to communicate to the engineer of the switching engine when to stop because of the cars which he was approaching. At the time of the accident, the plaintiff did not know that there was any agreement for joint operation and control of the yard.

The evidence of the defendant tended to controvert that of the plaintiff on nearly all of the material issues.

The deposition of one Benjamin was read by the plaintiff. From the deposition it appeared that, at the time of the accident to the plaintiff, the deponent was acting as yardmaster at the Rotterdam Junction yard. At the time of the taking of the deposition, the defendant objected to the following interrogatory as "incompetent, irrevelant and immaterial" and as "calling for facts not shown to have been actually observed by the witness and as calling for hearsay evidence." When the deposition was read to the jury, the objection by the defendant was renewed. The answer was read subject to the defendant's exception. The question and answer were as follows:

"Q. What steps did you take to ascertain whether or not any of the crew of the Fitchburg train was in a position of danger when the shifter was pushing the sleepers toward said Fitchburg cars, and what did you learn as a result of taking such steps? A. I didn't take any steps to ascertain if any of the Fitchburg crew were in danger. The train was in the yard conductor's charge, but he didn't take any such steps."

In the course of the direct examination of one Harriman, a witness for the defendant, he testified that at the time of the accident to the plaintiff he was serving as agent for the joint yard at Rotterdam Junction for the defendant and the Fitchburg Railroad Company under the contract described in the opinion. He was asked by the defendant's counsel "Under the practice there, what was the method whereby the men were protected in the operation of their work, as to whether they looked out for themselves or otherwise?" The plaintiff objecting, the defendant's counsel made the following offer of proof: "What I want to get at is whether in going in between the cars of the Fitchburg train there it devolved upon the man doing it to look out for himself, to use his eyes and look out for other trains. I wish to show, in the specific way of doing work there, it devolves

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upon him to look and ascertain whether the shifter is at work at the other end of the train." The question was excluded, and the defendant excepted.

Other facts are stated in the opinion.

At the close of the evidence, the defendant asked the presiding judge to rule as follows:

1. "That on all the evidence the plaintiff could not recover.

2. "On the evidence, the plaintiff and the crew of the shifter were fellow servants, and the defendant is not liable to the plaintiff for the negligence, if any, of the said shifting crew.

3. "On the evidence, the jury would be justified in finding that the plaintiff assumed the risk incident to the position he took between the cars and the engine.

4. "The test of the question whether the plaintiff and the other men engaged in the same work of making up the train in the joint yard were fellow servants or not is whether they were all subject to the control, orders and directions of the same master for that time, at that place and in that undertaking."

The presiding judge refused to rule as requested, and in his charge to the jury stated, "I have ruled that that shifting crew are not fellow servants with the plaintiff, and that the plaintiff may recover, as against the shifting crew, for the carelessness of that shifting crew, it being admitted that they are the servants of the defendant jointly with somebody else, if they were negligent."

The jury found for the plaintiff; and the defendant alleged exceptions.

A. R. Tisdale, for the defendant.

J. E. Hannigan, (*I. Fox* with him,) for the plaintiff.

SHELDON, J. The plaintiff, it is now settled by the verdict, received his injuries by reason of the negligence of the members of the shifting crew in the yard at Rotterdam Junction. These men were employed jointly by the defendant and the Fitchburg Railroad Company; and the first question raised by these exceptions is whether the judge should have ruled in accordance with the defendant's request, that the plaintiff and the members of this crew were fellow servants, and so that the plaintiff cannot recover for an injury occasioned by their negligence.

The operation of this yard and station was provided for by two

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written agreements between the respective predecessors of the defendant and the Fitchburg Railroad Company. Under these agreements, the operation of the yard and the right to the joint use of the main tracks were to be subordinate to the rules and regulations of the Fitchburg Company; a joint agent and joint employees were to be and were appointed by both companies, and were to be removed at the request of either company. All the employees in the yard were put under the immediate supervision and control of the joint agent, and any employee therein who should be unsatisfactory to either company was to be removed upon its request. Provision was made also for a division of the operating and other expenses of the yard, and it was stipulated that "Each party shall be liable for the damages resulting from the negligence of its own employees not in joint service while working in said yard, or on property jointly used under this contract, and each party will indemnify the other for any claim which it may be compelled to pay by suit or otherwise, arising out of any such case. Should any such damage result from the negligence of the joint employees in said yard, then the cost thereof shall be considered a part of the joint operation of said yard, and be borne jointly in the same proportion" as other operating expenses. The plaintiff's injury was caused by the negligence of joint employees in the yard; he was himself in the sole employment of the Fitchburg Railroad Company, and was not in the joint service of the two companies, unless by reason of the fact that while he was on the premises he was to be, under the agreement between the companies, "under the immediate supervision and control of the joint agent." The question accordingly is whether the plaintiff had become, and while in this yard and station was, the servant of the two companies jointly, and so a fellow servant with the employees by whose negligence he was injured.

There is no question that the general servant of any employer may be lent or hired, or in any way temporarily transferred by his master to another for some special service, so as to become, as to that service, the servant of such other person; and it is also true that the test by which a court will determine whether this has been done in any particular case ordinarily is whether the servant has become subject to the direction and control of

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the party to whom his services have been temporarily transferred. It is enough to refer to a few of the cases which have affirmed this doctrine. *Munsie* v. *Springfield Breweries Co.* 200 Mass. 79. *Delory* v. *Blodgett*, 185 Mass. 126. *Samuelian* v. *American Tool & Machine Co.* 168 Mass. 12. *Coughlan* v. *Cambridge*, 166 Mass. 268. *Hasty* v. *Sears*, 157 Mass. 123. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. But in all these cases, and indeed in all the cases in which this rule has been applied, so far as we have observed, the servant has himself had notice and knowledge of the change of his employer, and has assented thereto, or else has had full notice and knowledge of the circumstances out of which the changed relation was held to have grown as matter of law, and so, by continuing service under the new conditions, has assented to the legal consequences which resulted therefrom. The exemption of a master from liability to a servant for an injury caused by the negligence of other servants in the same employment, like the liability of the master for those breaches of duty for which he may be held liable to his servants, is now commonly rested on the ground of agreement implied in the contract of service. *Heffernan* v. *Fall River Iron Works Co.* 197 Mass. 28. *Hasty* v. *Sears*, 157 Mass. 123, 125. *Kelly* v. *Johnson*, 128 Mass. 530, 531. *Johnson* v. *Boston*, 118 Mass. 114, 117. *Zeigler* v. *Danbury & Norwalk Railroad*, 52 Conn. 543, 555. *Dowd* v. *New York, Ontario & Western Railway*, 170 N. Y. 459. *Young* v. *New York Central Railroad*, 30 Barb. 229, 234. Blackburn, J., in *Howells* v. *Landore Siemens Steel Co.* L. R. 10 Q. B. 64. Brett, L. J., in *Swainson* v. *Northeastern Railway*, 3 Ex. D. 342. A servant who has made such a contract with one master cannot be held, against his will or without his consent expressed or implied, to have abrogated or suspended his contract and to have made instead a new contract with a third party. Accordingly, Lord Watson said in *Johnson* v. *Lindsay*, [1891] App. Cas. 371, 382: "I can well conceive that the general servant of A. might, by working towards a common end along with the servants of B. and submitting himself to the control and orders of B., become *pro hac vice* B.'s servant, in such a sense as not only to disable him from recovering from B. for injuries sustained through the fault of B.'s proper servants, but to exclude the liability of A. for injury occasioned by his fault, to B.'s own workmen. In

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order to produce that result the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master, for the purposes of the common employment." This language was quoted with approval and followed by this court in *Morgan* v. *Smith*, 159 Mass. 570, in which it was said also that the reasons for the rule of the exemption of a master *pro hac vice* from liability for the negligence of his other servants "have no application unless the servant knows that he ceases to be under the control of the master who employs him, and passes under the control of a new master." The same doctrine has been affirmed in other cases, some of which are cited in *Morgan* v. *Smith*, *ubi supra*. See also *Delaware, Lackawanna & Western Railroad* v. *Hardy*, 30 Vroom, 35; *Missouri, Kansas & Texas Railway* v. *Ferch*, 36 S. W. Rep. 487. But in the case at bar it was not claimed that the plaintiff had any knowledge of the contracts between the two companies, or any notice or knowledge that he was under the direction or control of any one acting either for the defendant or for the two companies jointly. His rights are not to be affected by the provisions of agreements between his employer and other parties not brought in any way to his attention. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437. *Robertson* v. *Boston & Albany Railroad*, 160 Mass. 191, 193. *Zeigler* v. *Danbury & Norwalk Railroad*, 52 Conn. 543, 555. *Philadelphia, Wilmington & Baltimore Railroad* v. *State*, 58 Md. 372.

It is of course not to be claimed that the employee of a single railroad company can be regarded as a fellow servant with those who are employed by that and another company acting jointly, just as the bookkeeper or stenographer of an individual is not a fellow servant with the employees of a firm of which his master is a member.

It may be added that there is a large number of decisions in other jurisdictions in which, under traffic arrangements between different carriers, more or less closely resembling the case at bar, it has been held that the defense of common employment, or the fellow servant doctrine, was not applicable. Some of these have been already referred to. Others are *Nary* v. *New York, Ontario*

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& Western Railway, 125 N. Y. 759, affirming *S. C.* 9 N. Y. Supp. 153; *Murphy* v. *New York Central & Hudson River Railroad*, 118 N. Y. 527; *Sullivan* v. *Tioga Railroad*, 44 Hun, 304; *Hurl* v. *New York Central & Hudson River Railroad*, 73 N. Y. Supp. 1042; *Tierney* v. *Syracuse, Binghampton & New York Railroad*, 85 Hun, 146; *Sawyer* v. *Rutland & Burlington Railroad*, 27 Vt. 370; *Catawissa Railroad* v. *Armstrong*, 49 Penn. St. 186; *Vannatta* v. *Central Railroad*, 154 Penn. St. 262; *Phillips* v. *Chicago, Milwaukee & St. Paul Railway*, 64 Wis. 475; *Galveston, Harrisburg & San Antonio Railway* v. *Sweeney*, 6 Tex. Civ. App. 173; *Texas & Pacific Railway* v. *Easton*, 2 Tex. Civ. App. 378; *Bosworth* v. *Rogers*, 82 Fed. Rep. 975; *Baker* v. *Philadelphia & Reading Railway*, 149 Fed. Rep. 882; *Vose* v. *Lancashire & Yorkshire Railway*, 2 H. & N. 728.

Accordingly the defendant's requests for instructions upon this subject were properly refused; and as the defendant's exceptions were taken only to the refusal of its requests, we need not consider whether the judge went too far in ruling that as matter of law the plaintiff was not a fellow servant with the members of the shifting crew, or whether that question should have been submitted to the jury. *Dugan* v. *Blue Hill Street Railway*, 193 Mass. 431.

We think it manifest that upon the evidence it was for the jury to say whether the plaintiff, in acting as he did in obedience to the order of his conductor, was himself in the exercise of due care, whether or not he assumed the risk incident to the position which he took between the cars and the engine, and whether the accident was due to negligence of the members of the shifting crew. *Taylor* v. *Boston & Maine Railroad*, 188 Mass. 390. *Coughlan* v. *Cambridge*, 166 Mass. 268. *Murray* v. *Fitchburg Railroad*, 165 Mass. 448. *Caron* v. *Boston & Albany Railroad*, 164 Mass. 523. *Austin* v. *Fitchburg Railroad*, 172 Mass. 484. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. *Loomis* v. *Lake Shore & Michigan Southern Railway*, 182 N. Y. 380.

The question put to Harriman by the defendant was properly excluded upon the offer of proof made. It was not disputed that the plaintiff was a comparative stranger at this yard, and there was no offer to show that any practice or method which had been adopted was known or had been communicated to him. He

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did not complain and was not allowed to recover upon the ground of any danger ordinarily incident to the coupling of the cars and the making up of the train, but merely for the negligence of the defendant's men in backing down in the way they did. This is made plain by what the judge said to the jury in his charge: "There is no evidence that it was the practice to give previous notice to the trainmen . . . of the approach of cars about to couple on. The plaintiff's claim is that they ought not to back down there as they did, and that it was negligent for them to do so." That he did not assume that risk is shown by the cases already referred to.

The question put to Benjamin was plainly competent. He exercised some control of the crew of the shifting engine; and negligence on his part as well as theirs was asserted by the plaintiff. There was no motion to strike out any part of what was said in the answer of the witness.

Exceptions overruled.

GODDA R. ZEITLIN *vs.* ADOLPH ZEITLIN.

Middlesex. March 9, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Marriage and Divorce, Petition to vacate decree. *Superior Court. Judgment.*

The Superior Court has no power to vacate a decree for divorce after it has become absolute, where the court had jurisdiction to grant the decree, even though the decree was made because of perjured testimony knowingly procured by the libellant, and because of gross fraud practised upon the court.

PETITION filed in the Superior Court for the county of Middlesex on October 8, 1906, to vacate a decree of divorce, which was entered *nisi* in that court on March 8, 1905, and which became absolute on September 8, 1905.

The petition was heard by *Fessenden*, J., who allowed the petition and vacated the decree and, the respondent appealing, reported the case for determination by this court. His report stated, among other facts, the following:

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The alleged ground for the divorce was desertion. "The libel was properly brought in Middlesex county on May 5, 1904, was uncontested, and was heard and determined by *Aiken*, C. J., on March 8, 1905. The libellee had notice in due course of the pendency of the libel, the libellant in accordance with the order of the court having mailed to her, postage prepaid, at her address in Mogilow, Russia, a certified copy of the libel with the order of notice thereon, which papers she duly received before June 10, 1904. The libellee at the time she received these papers was a person of little education and entirely ignorant of the English language; she had no money with which to come to Massachusetts; and the libellant, who had been in this country for some years, had made no effort to send her money for the purpose of coming here to contest the divorce libel or for any other purpose. Mogilow is a city of some size in the interior of Russia.

"Shortly after the entry of the decree *nisi* the libellant wrote a letter to the libellee at her address in Mogilow, in her native tongue, informing her of the divorce proceedings and of said decree. That letter she duly received.

"The decree *nisi* on the ground of desertion was obtained upon the evidence of the libellant and of one Pinzur, the libellant's brother in law, a Russian immigrant, who had arrived in this country shortly before the filing of the libel, and who testified that he had called upon the libellee in Russia shortly before sailing for America, and that she had then positively refused to come to America at any time. The testimony of this witness was false, the fact being that the libellee had expressed to Pinzur her willingness to come to this country. The libellant knew that this testimony of Pinzur was false, for Pinzur had told him, before the hearing on the divorce libel, of the libellee's willingness to come to America. After consultation with the Chief Justice, which was had with the consent of the parties, I find as a fact that the decree *nisi* would not have been entered without the evidence of the witness Pinzur, but on the contrary that the libel would have been dismissed.

"The libellee came to the United States in July, 1906, which was as early as she was able to come after getting notice of the divorce proceedings, and filed this petition. If material, I find that in the mean time, but after the decree *nisi* had become abso-

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lute, the libellant, having no notice of any such proposed action on the part of the libellee, married again, and had a child by his second wife. This second wife and the child are now living.

"On the above facts I found that a gross fraud had been perpetrated on the court in the obtaining of the decree *nisi*."

F. R. Hall, for the respondent.

R. Homans, (*F. J. Sulloway* with him,) for the petitioner.

KNOWLTON, C. J. This is a petition to vacate a decree of divorce obtained by the respondent against the petitioner. The jurisdiction of the court that granted the divorce, both over the case and the parties, was perfect. The ground on which the petition rests is that the case for a divorce was made out at the hearing by perjured testimony, knowingly procured by the libellant. The only question presented is whether a decree of divorce so obtained should be vacated upon proof of the fraud practised upon the court.

It is in the interests of justice that, after a trial and final judgment in a case, the matters heard and adjudicated shall not be opened for a further hearing because of a supposed error in the determination of facts by the tribunal that heard the evidence. A contention that some part of the material testimony was false might be made with plausibility in a large proportion of the cases that are tried. A contention that the prevailing party knowingly gave or procured false testimony, upon an issue involved, might be made and strongly supported in a great many cases. It is against public policy to open cases on no other ground than this.

In *Keyes* v. *Brackett*, 187 Mass. 306, it was assumed, with a citation of authorities, that the law does not permit an attack of this kind upon a judgment or decree, entered upon the merits, after a hearing or trial between adverse parties upon issues arising in an ordinary case in a court of justice. The fraud that was held sufficient to give relief in that case was practised upon a master, on the question whether a bond to dissolve a mechanic's lien should be approved as sufficient. Fraud which is extrinsic or collateral to the matter tried, whereby the court was induced to assume jurisdiction when in fact it had no jurisdiction, or whereby the unsuccessful party was prevented in any way from being properly heard upon a subject which entered into the

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merits of the matter before the court, may be a ground of vacating a judgment or decree. But in *Holbrook* v. *Holbrook*, 114 Mass. 568, Chief Justice Gray said: "A decree of divorce will not be vacated or set aside by the court after the term at which it was entered, without clear proof that the libellee was prevented by fraud of the libellant or imposition upon the court from being heard in the original suit upon some matter which, if then proved, would have constituted a good defense." In *Greene* v. *Greene*, 2 Gray, 361, Chief Justice Shaw pointed out very clearly the objections to setting aside a decree for divorce upon an application in subsequent proceedings. One of the facts to which he referred, namely, a marriage upon the faith of the decree and the birth of a child of the marriage, exists in the present case. In *Edson* v. *Edson*, 108 Mass. 590, it was held that such a decree may be vacated when the jurisdiction of the court was founded wholly or in part upon the fraud of the successful party. The decision in *Greene* v. *Greene*, 2 Gray, 361, that a libel to set aside a decree of divorce on the ground that it was obtained by false testimony, fraudulently procured, cannot be maintained, is reaffirmed in this later case. The fact that the application to set aside the original decree was contained in a libel in which a divorce was prayed for was treated as immaterial. The Chief Justice said: "We can perceive no difference between a case where a libellant inserts such an allegation and prayer in an original libel by which she seeks a divorce *a vinculo* on another ground, and a case where such an allegation and prayer are made the only subject of an original libel to set aside a former decree. The object in both cases is to reverse and annul a subsisting decree." This decision is in accordance with the general doctrine in other courts. *United States* v. *Throckmorton*, 98 U. S. 61. *Smith* v. *Lowry*, 1 Johns. Ch. 320. *Pico* v. *Cohn*, 91 Cal. 129. *Maryland Steel Co.* v. *Marney*, 91 Md. 360, 374. 2 Bish. Mar. & Div. 1571, and cases cited.

Decree reversed.

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SARAH F. STRONG, executrix, *vs.* CARVER COTTON GIN COMPANY.

Suffolk. March 10, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Contract, Implied in fact. *Practice, Civil*, Report.

In an action by the owner of a patent, against a corporation, on an agreement implied in fact to pay to the plaintiff royalties on machines made and sold by the defendant as being covered by the plaintiff's patent although they were not covered by it, it was not denied by the defendant that for a time an agreement to pay such royalties might be inferred or implied from its conduct, but it contended that such implied agreement had been terminated by a notice given by the defendant to the plaintiff that it was not using the plaintiff's patent and did not intend to pay any further royalties upon the machines it was making and selling. There was evidence of the giving of such a notice, but there also was evidence that after the time when the notice was said to have been given and up to the date of the writ the defendant's machines continued to be marked, advertised and sold as patented under the plaintiff's patent. *Held*, that, although the defendant could at any time have terminated the arrangement under which it was paying royalties to the plaintiff to which without such arrangement the plaintiff would have had no claim, yet it was a question for the jury whether the notice was given, and the fact that the defendant continued to mark, advertise and sell its machines as made under the plaintiff's patent was some evidence that it regarded the previous arrangement as still in force, so that it was right for the presiding judge to leave to the jury the question whether the arrangement by which the defendant agreed to pay royalties to the plaintiff was in force during the whole period up to the date of the writ, even if a finding that it was in force during the whole period would be greatly against the weight of the evidence.

A judge of the Superior Court under R. L. c. 173, § 105, has power in his discretion to report a case for determination by this court, although his only reason for doing so is that the losing party by accident or mistake failed to file a bill of exceptions within twenty days after the verdict, exceptions having been taken properly at the trial which in the opinion of the judge presented material questions that should be passed upon by this court.

CONTRACT by Sarah F. Strong, executrix of the will of Frederick S. Strong, one of the owners of letters patent of the United States issued to Frederick S. Strong and Frederick C. Mann on August 22, 1893, for an automatic feed attachment, against the defendant as exclusive licensee under that patent, to recover royalties for automatic feed attachments made and sold by the defendant under the patent and license, the first count for the recovery of royalties under a contract in writing, and the

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second count for the recovery of royalties by virtue of an implied obligation to pay them growing out of the defendant's having sold its machines as and for machines covered by the plaintiff's patent, even although the patent did not cover the defendant's machines. Writ dated September 28, 1904.

In the Superior Court the case first was tried before *Bond*, J. The jury returned a verdict for the plaintiff in the sum of $17,840.91, and the defendant alleged exceptions, which were sustained by this court in a decision reported in 197 Mass. 53.

There was a new trial before *Brown*, J., who ordered a verdict for the defendant on the first count, and submitted the case to the jury on the second count. On that count the jury returned a verdict for the plaintiff in the sum of $14,250.64. The defendant took various exceptions during the trial, but failed to file a bill of exceptions within twenty days after the verdict. The judge, because such failure was due to inadvertence, and because he was of the opinion that there was a material question of law involved in the exceptions which the defendant intended to file that should be passed upon by this court, reported the case for determination by this court, against the objection and exception of the plaintiff. In the exceptions intended to be filed the defendant contended that upon the state of facts disclosed at the trial there was no evidence upon which the plaintiff could be awarded royalties for the whole period to the date of the writ, that, the defendant having in July or at some time later in 1900 refused to pay further royalties, thereafter the markings and descriptions used by the defendant, as matter of law, were insufficient to impose on the defendant any liability for royalties. The judge, however, left the case to the jury as to the entire period up to the date of the writ, and the jury returned their verdict for the whole period. If the judge should have left the case to the jury as to the whole period, judgment was to be entered on the verdict; otherwise, the case was to be sent back for a new trial.

R. Cushman, for the plaintiff.

J. W. Farley, (*W. Quinby* with him,) for the defendant.

SHELDON, J. It is assumed by both parties that the judge of the Superior Court acted rightly in ruling that the machines which had been manufactured and sold by the defendant were

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not within the terms of the letters patent held by the plaintiff and Mann, and in ordering a verdict for the defendant on the first count of the declaration. But the plaintiff sought in her second count to hold the defendant for royalties upon the ground that the defendant had manufactured and sold its machines as and for machines covered by the plaintiff's patent, and included within the terms of the written agreement, and so had impliedly agreed to pay royalties upon them according to those terms. *Strong* v. *Carver Cotton Gin Co.* 197 Mass. 58. The question now raised upon the report is whether it can be so held for the whole period after July 1, 1900, when the defendant ceased to pay any royalties, up to the date of the writ.

The defendant did not deny that such an agreement, by inference or implication from its conduct, as was alleged by the plaintiff, could be found to have existed for a time, but contended that this had been terminated in July, 1900, or at some later time in that year, by a verbal notice to the plaintiff that the company did not consider that it was using her patent, and did not intend any further to pay royalties upon the machines which it was making and selling. There was also much evidence of a like notice given to Mann, the plaintiff's joint licensor, who was then living. But there was also evidence that after that time and up to the date of the writ, the defendant's machines continued, as before, to be marked, advertised and sold as patented under the plaintiff's patent.

There is no doubt that the defendant, at any time and for any reason, could terminate the arrangement under which it was paying to the plaintiff royalties for which, without that arrangement, she would have had no legal claim. And the testimony at the trial tended strongly to show that the defendant had so acted. But this testimony was for the jury. Even that part of it which was not directly contradicted, such as the testimony relating to the notice said to have been given to Mann, cannot be now regarded as conclusive, for the jury had a right to disbelieve it. *Lewis* v. *Coupe*, 200 Mass. 182, 187, and cases cited. And the very fact that the defendant continued to mark, advertise and market its machines as made under the plaintiff's patent was some evidence that it regarded the previous arrangement as still in force. How far the effect of this was weakened by the

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fact that it was done by Mann or under his direction, was for the jury to consider. So, too, it was for the jury to consider how far the weight of this evidence was affected by the fact that after the defendant had once actually terminated the existing arrangement between it and the plaintiff, it would not have been material in this action whether it marked or advertised its machines in one way or another. Although it well might have been expected that the jury would agree with the contention of the defendant, yet we have not the right to interfere with their finding merely because it may seem to have been against the great weight of the evidence. *Saures* v. *Stevens Manuf. Co.* 196 Mass. 543, 547. In our opinion it was for the jury to say whether or not there had been any termination of the arrangement and understanding that they might find had been come to between these parties, and the whole question was rightly submitted to them.

As the question of practice has been argued, we add that we do not doubt the power of a judge of the Superior Court, under R. L. c. 173, § 105, to report a case to this court, even though his motive for so doing is that the losing party by accident or mistake has failed to prosecute exceptions which were properly taken, and which, in the opinion of the judge, presented material questions that should be passed upon by this court. It was for him to determine, in the proper exercise of his discretion, whether he would report the case; *Electric Welding Co.* v. *Prince*, 200 Mass. 386, 391, 392; *Smith* v. *Lincoln*, 198 Mass. 388, 392, and cases cited; and we cannot find in this case any wrongful exercise of that discretion.

In accordance with the terms of the report, the order must be

Judgment on the verdict.

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CHARLES W. BOYD *vs.* EDWIN W. TAYLOR & another.

Middlesex. March 11, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Practice, Civil, Ordering verdict.

In an action by a workman in a sausage factory against his employers for personal injuries incurred when set at work to operate a meat chopping machine of the defendants, where exceptions to a ruling of the presiding judge at a former trial, ordering a verdict for the defendants at the close of the plaintiff's evidence, had been sustained by a decision concurred in by a majority of this court, the evidence for the plaintiff at a new trial did not differ in substance from that presented at the former trial, and, after a disagreement of the jury, a verdict again was ordered for the defendants. Exceptions alleged by the plaintiff were sustained by this court upon the authority of the former decision.

TORT for personal injuries incurred on October 30, 1901, while in the employ of the defendants, manufacturers of sausages doing business in Boston under the name of Park's Sausage and Provision Company, when the plaintiff had been set at work to operate a meat chopping machine of the defendants. Writ dated April 14, 1908.

In the Superior Court the case first was tried before *Bell*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendants. The plaintiff alleged exceptions, which were sustained by this court in a decision reported in 195 Mass. 272.

There was a new trial before *Bond*, J., at which evidence was introduced by both parties. The evidence for the plaintiff is described in the opinion as not differing in substance from that presented at the first trial.

At the close of the evidence the defendants asked the judge to direct a verdict for the defendants. This the judge refused to do, and the defendants excepted. The judge then submitted the case to the jury under full instructions at 10.15 A. M. on November 4, 1908. At 9.30 A. M. on November 5, the jury reported a disagreement. Thereupon the judge directed the jury to return a verdict for the defendants; and the plaintiff alleged exceptions.

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J. Noble, Jr., (*H. J. Coolidge & F. R. Boyd* with him,) for the plaintiff.

P. S. Maher, for the defendants.

RUGG, J. This case was before us upon an exception to the direction of a verdict for the defendants as reported in 195 Mass. 272. It was held then that there was evidence which required a submission to the jury of the due care of the plaintiff and the negligence of the defendant. A careful comparison of the testimony upon the present record with that at its earlier presentation shows no substantial differences and that it is the same as to the fundamental points. The defendants are not able to suggest any real distinction in the evidence at the two trials. The fact that the former opinion was concurred in only by a majority of the court demonstrates that the questions are extremely close. But, upon the authority of the former decision, the evidence is not quite clear enough to warrant the direction of a verdict for the defendants.

Exceptions sustained.

JAMES F. GERRITY *vs.* WAREHAM SAVINGS BANK.

Plymouth. March 12, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Savings Bank. Mortgage, Of real estate. *Assignment. Payment.*

Where the treasurer of a savings bank has been entrusted by its board of investment with the negotiation of a loan secured by a mortgage of real estate, further acts on his part, on discovering an outstanding attachment of the real estate, in requiring a first mortgage, prior to the attachment, to be assigned to the bank as security for the mortgage to the bank, instead of allowing it to be paid off, are within his implied authority as an executive officer of the corporation entrusted with the negotiation of the loan, and subsequent proceedings, to foreclose the underlying mortgage thus assigned to the bank, instituted by vote of its board of investment, are a ratification of the acquisition of the underlying mortgage as security.

If a savings bank, acting in good faith and solely in the interest of the bank, takes an assignment of an underlying mortgage to secure a loan made by it which already is secured by a second mortgage held by it on the same property, instead of causing the underlying mortgage to be paid off and discharged, this is a valid transaction against a person whose claim is subject to such underlying mortgage,

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although the requirements of R. L. c. 113, § 26, cl. 1, and of § 29 of the same chapter in regard to the making of a loan on mortgage by a savings bank have not been complied with in taking the assignment.

A savings bank agreed to make a loan to a landowner, who was engaged in constructing a building on his land and already had made a mortgage on the land to secure a construction loan which was to cover the whole or any part of the amount named in the mortgage which should be advanced by the mortgagee. This mortgage was recorded. The bank was to take a mortgage on the same property if the title was found to be satisfactory. An examination of the title disclosed the fact that there was an attachment on the land made after and subject to the construction mortgage. The bank thereupon required that the underlying construction mortgage should be assigned to it as part of the transaction of making the loan, and agreed to hold it, first, "for the security and protection" of the bank as the holder of the later mortgage, and, second, for the security and protection of the mortgagee under the construction mortgage, as the holder of a third mortgage which was given to him by the mortgagor on his assigning the construction mortgage to the bank. Thereafter the bank instituted proceedings to foreclose the construction mortgage. The attaching creditor, who had obtained a judgment and had caused the mortgaged property to be sold to himself on execution, brought a bill in equity against the savings bank to enjoin the foreclosure of the construction mortgage, praying to have the assignment to the defendant set aside, or declared to be a discharge and satisfaction of the assigned mortgage, or to be allowed to redeem the real estate from the construction mortgage without being charged with sums advanced under that mortgage after his attachment had been recorded. *Held*, that, it having been the intention of the parties that the construction mortgage should be kept alive and the indebtedness not extinguished or discharged, the defendant held that mortgage by an effective assignment, and that the mortgage covered all the payments made under it and used for the purchase of the land and the construction of the building as well after notice of the plaintiff's attachment as before, the mortgage, as recorded at the time of the attachment, having fixed definitely the amount of the ultimate indebtedness thereunder and the continuance of the work of construction having merely carried out the contract according to its terms.

The assignee of a mortgage of real estate acquires the right to foreclose it for a breach of condition which occurred before the assignment.

BILL IN EQUITY, filed in the Superior Court on May 21, 1908, by a judgment creditor of one Morris Wheeler, who on September 9, 1907, had made an attachment upon certain real estate of Wheeler on Brunswick Street in that part of Boston called Roxbury, and on March 21, 1908, had caused such real estate to be levied upon in execution and to be sold to himself, subject to a mortgage made by Wheeler to one Joseph Rudnick on March 22, 1907, and assigned by Rudnick to the defendant on October 15, 1907, when such mortgage was overdue, alleging that the defendant paid no consideration for such assignment and that such mortgage had been paid and satisfied on October 15, 1907,

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when the defendant received from Wheeler two later mortgages upon the same property, that the defendant took the assignment of the mortgage from Rudnick knowing of the plaintiff's rights and designing to deprive him of them, and that on April 25, 1908, the defendant began foreclosure proceedings under the mortgage assigned to it by Rudnick, that the plaintiff offered to pay to the defendant whatever sums were due and payable to it under that mortgage, but that the defendant refused to account to the plaintiff or to receive the money or to discontinue the foreclosure sale; and praying that the assignment of the mortgage of March 22, 1907, from Rudnick to the defendant might be decreed to be in equity a discharge of that mortgage, that the defendant might be ordered to cancel and discharge that mortgage, that an accounting might be decreed between the plaintiff and the defendant to ascertain the amount, if any, which was due upon that mortgage of March 22, 1907, if it should be proved at the trial that the defendant paid a lawful consideration for the assignment, that an accounting might be had between the plaintiff and the defendant to ascertain the amount, if any, which was due to the defendant upon the mortgages of October 15, 1907, that the defendant might be enjoined from transferring, assigning, or otherwise disposing of the mortgages of October 15, 1907, that the defendant, its agents and servants, might be enjoined from further proceeding with the foreclosure sale of the mortgage of March 22, 1907, and for further relief.

The material facts were in substance as follows:

At the time the attachment was made Wheeler, who was a builder, was engaged in the construction of a building upon the land. He had, long before the attachment, given a mortgage of $24,000 on the property to Rudnick, of which $6,000 represented the purchase price of the land (which had been conveyed by Rudnick to Wheeler), $15,000 Rudnick agreed to advance from time to time to be used in the construction of the building, and $3,000 by agreement was left to be advanced or not, as Rudnick might see fit. If Rudnick should advance the whole $3,000, the mortgage was to be security therefor; if he should advance less than $3,000, the mortgage was to be cut down accordingly. Rudnick, before the attachment, had agreed with Wheeler to advance the full amount, and before September 9,

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1907, the date of the attachment, had advanced in money $16,850, and after that time his further advances in money aggregated $1,903.

Shortly before October 15, 1907, the building being practically completed, Wheeler applied to the Wareham Savings Bank, the defendant, for a permanent mortgage loan of $24,000 on the property. The bank, through its investment committee, after investigation, agreed to make a loan of $22,000, provided Wheeler would take $20,000 thereof in cash and $2,000 in some land owned by the bank in Boston. This proposition was accepted by Wheeler, and the matter was referred by the bank to its conveyancer, Samuel T. Harris.

Mr. Harris examined the title, prepared the papers, and found everything right except for the attachment outstanding in favor of the plaintiff against Wheeler. This was called to the attention of one Besse, the treasurer of the bank, on October 15, 1907, at the registry of deeds by Mr. Harris. Besse had come from Wareham as the agent of the bank, bringing the money and ready to complete the transaction. Mr. Harris advised him that an assignment of the first mortgage — namely, the Rudnick construction mortgage of $24,000 — to the bank, as additional collateral security for the loan, would render the investment by the bank entirely safe. The treasurer, without the express authority of or consultation with the board of investment, relying on the advice of Mr. Harris, agreed to take the assignment of the mortgage, and such assignment was drawn and recorded, and the two new mortgages of $11,000 each were placed on record, and the money was turned over. Wheeler, being indebted to Rudnick for an amount considerably in excess of the $20,000 cash then paid over, turned this cash over to Rudnick. Rudnick immediately took another mortgage from Wheeler, which was placed on record, in the sum of $5,616, which represented the balance due Rudnick from Wheeler; and the bank by Besse, its treasurer, signed the instrument printed below.

On April 8, 1908, there having been a breach of the original Rudnick mortgage, Besse, the treasurer of the defendant bank, in its behalf entered and took possession of the premises for the purpose of foreclosing the same. Upon the bank's taking possession, the plaintiff brought the present bill, and the sale under the

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power contained in the original Rudnick mortgage was adjourned from time to time.

The instrument signed in behalf of the defendant, referred to above, was as follows:

"Boston, October 15, 1907.

"Whereas, there has been this day assigned to the Wareham Savings Bank by Joseph Rudnick a mortgage of twenty-four thousand (24,000) dollars dated March 22, 1907, and recorded with Suffolk Deeds Book 3197 Page 587 covering the estates Nos. 58 & 60 Brunswick Street in that part of Boston, Mass., formerly Dorchester;

"Now, the said Wareham Savings Bank hereby declares and acknowledges that it has received said mortgage and holds the same as a muniment of title and for the following purposes, namely:

"1. For the security and protection of said bank as the holder of two mortgages each dated October 15, 1907, and each for twelve thousand (12,000) dollars given to it by Morris Wheeler, one upon the estate No. 58 Brunswick Street, and the other upon the estate No. 60 Brunswick Street, both of which mortgages have this day been recorded with Suffolk Deeds.

"2. For the security and protection of Joseph Rudnick (subject to the rights of said bank as herein recited) as he is the holder of a certain mortgage given to him this day by said Morris Wheeler for fifty-six hundred and sixteen (5616) dollars, covering both of said estates;

"3. The said mortgage of twenty-four thousand (24,000) dollars assigned to the said bank as aforesaid may be discharged by it at any time after sixty days from the date hereof without the assent of the said Joseph Rudnick and Morris Wheeler or either of them, if in the opinion of Samuel T. Harris of Boston aforesaid such discharge will not in any way affect or impair the respective rights and security of the said bank and of the said Joseph Rudnick under their above described mortgages this day recorded as aforesaid.

"Wareham Savings Bank,
By Frank A. Besse, Treas."

The case came on to be heard by *Richardson*, J., who reserved it for determination by this court, reporting the evidence.

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D. Stoneman, for the plaintiff.

F. N. Nay, for the defendant.

BRALEY, J. The plaintiff as the purchaser at the sale on execution, having acquired the interest of the judgment debtor at the date of the attachment in the realty described in the bill, the subsequent mortgages given to the defendant were subject to his title. R. L. c. 178, § 26. *Wiggin* v. *Heywood*, 118 Mass. 514, 516. But the bank, having obtained by assignment from Rudnick the prior outstanding mortgage given to secure advances for the purchase price of the land and the construction of the buildings, which it is proceeding to foreclose, the plaintiff asks for a decree, that either the bank has no valid title, or that the mortgage has been discharged and extinguished, or that, if still enforceable, he can redeem without being charged with the sum advanced by the mortgagee after the attachment had been recorded.

It is manifest from the agreed statement of the evidence, that, before recording the mortgages given to secure the loan obtained from the defendant, the treasurer upon being notified of the attachment procured the assignment of the first mortgage for the protection of the bank. If the concurrent agreement with the assignor and the assignment are construed as one instrument, the recitals show there was no intention to depart from the purpose for which it had been obtained. The bank indeed stipulated that the assignor's second mortgage should be protected, but the defendant concedes that the stipulation cannot impair the priority of the attachment. The negotiation of the loan and the execution of the papers appear to have been intrusted to the treasurer, and his subsequent acts upon ascertaining the condition of the title being for the benefit of the bank, were, under the circumstances, within his implied powers as an executive officer of the corporation. *Bristol County Savings Bank* v. *Keavy*, 128 Mass. 298. Yet, if his original authority may not have been so broad, the foreclosure by entry and sale afterwards instituted by vote of the board of investment was a sufficient ratification. *North Brookfield Savings Bank* v. *Flanders*, 161 Mass. 335. *New England Ins. Co.* v. *Wing*, 191 Mass. 192.

Nor can the defendant's title be successfully attacked because

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being a savings bank subject to the limitations as to investments found in R. L. c. 113, § 26, cl. 1,* as the plaintiff contends, it was prohibited from taking the assignment, or under its chartered powers from binding itself by the accompanying agreement. The plaintiff does not charge fraud, and the transaction, having been entered into and performed in good faith solely in the interest of the bank, was a valid one, and, even if upon discovery of the state of the title the defendant could have refused to complete the negotiations, it cannot be assailed on this ground. *Chaffee* v. *Middlesex Railroad*, 146 Mass. 224. *New York Bank Note Co.* v. *Kidder Press Manuf. Co.* 192 Mass. 391, 404, and cases cited. *National Bank* v. *Matthews*, 98 U. S. 621. *National Bank* v. *Whitney*, 103 U. S. 99. *Force* v. *Age-Herald Co.* 136 Ala. 271.

If, instead of lending the money on the mortgages which was to be paid by the mortgagor to Rudnick in discharge of the first mortgage, the defendant had advanced the proceeds directly to him, and then had taken an assignment, the transaction would not have operated as a payment, but as a purchase. *Bremer* v. *Columbian National Ins. Co.* 199 Mass. 344. It having been the intention of the parties that the mortgage should be kept alive, the indebtedness was not extinguished or discharged, and the defendant succeeded to the security. *Everett* v. *Gately*, 183 Mass. 503, 505. *Chetwynd* v. *Allen*, [1899] 1 Ch. 353. It is not contended that either the amount paid by the bank, or the sum advanced by Rudnick after notice of the attachment was in excess of the disbursements actually used for the purchase of the land and the construction of the building.

By the sale on execution the plaintiff came into the ownership of the property, of which the money put into the buildings formed a part. In the effort to retain the benefit of the last instalment by having it excepted from the mortgage, the plaintiff relies on the case of *Barnard* v. *Moore*, 8 Allen, 273, where after mortgaged personal property had been attached and the

* The provision of this section referred to in the plaintiff's brief was that "A loan on mortgage shall not be made except upon the report of not less than two members of the board of investment, who shall certify" as there required. The requirements of § 29 as to applications for loans also were referred to.

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mortgagee had been summoned as a trustee, he sought to avail himself of the mortgage to secure other sums falling due from the mortgagor subsequent to the attachment and service. It was said in the opinion, that, the claim of the attaching creditor having become fixed, a new and distinct indebtedness could not be added which arose afterwards.

In the present case the full amount of the ultimate indebtedness was definitely fixed by the mortgage deed, which had been recorded, and, if only a part had been advanced at the time of the attachment, the plaintiff had constructive notice of the contract, the performance of which had not been interrupted. The continuance of the work of construction was not in any sense an attempt to tack on a new debt since contracted, but was the carrying out of the contract according to its terms. The mortgage still remained a valid incumbrance, to which for the full amount the plaintiff's title is subordinate. *Bassett* v. *Daniels*, 136 Mass. 547. *Tillinghast* v. *North End Savings Bank*, 178 Mass. 458. *Robinson* v. *Williams*, 22 N. Y. 380. *Witczinski* v. *Everman*, 51 Miss. 841, 845. *Nelson* v. *Iowa Eastern Railroad*, 8 Am. Ry. Rep. 82. *Galveston, Houston, & Henderson Railroad* v. *Cowdery*, 11 Wall. 459. It appears that when the mortgage was assigned the taxes which the mortgagor covenanted to pay were in arrears, and, they having remained unpaid, the plaintiff contends that the defendant cannot foreclose for this breach. But the unrestricted right of foreclosure continued, and could be exercised as well after as before the assignment. The power to sell for a covenant broken was not controllable at the will of the mortgagor, or by his successor in title, but, being irrevocable, could be suspended or waived only by the consent of the mortgagee, or by the defendant to whom his rights had passed.

The result is, that the plaintiff is entitled to redeem on payment of the amount of the mortgage, and costs of foreclosure.

Decree accordingly.

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MARY GILLIS *vs.* CAMBRIDGE GAS LIGHT COMPANY.
COLIN F. GILLIS *vs.* SAME.

Middlesex. March 18, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., LORING, BRALEY, & SHELDON, JJ.

Negligence. Evidence, Presumptions and burden of proof.

It is not negligence as matter of law to step voluntarily on the cover of a coal hole in the sidewalk of a city street, which appears to be safe, with knowledge of the existence of the hole beneath the cover.

In an action by a woman, for personal injuries caused by one of her legs going down into a coal hole in the sidewalk of a city street when she stepped on the cover which appeared to be safe, against a corporation whose teamster on the morning of the accident had used the coal hole in making a delivery of coke to a customer, there was evidence that, if the rim into which the cover fitted was left clean, the cover, when replaced, would not tilt but would remain firmly in position, but that, if coke was allowed to remain on the rim when the cover was replaced, the cover when stepped on might be thrown up or partially come out. It appeared that the accident occurred more than fours hours after the use of the coal hole by the defendant's servant, and the defendant contended that, with the opportunity thus afforded for others to have disturbed or displaced the cover, the evidence failed to show that its negligence was the efficient cause of the injury. *Held,* that, in the absence of any satisfactory explanation by the defendant to the contrary, the jury would have a right to infer that from the time the cover was replaced by the defendant's servant until the plaintiff stepped on it the cover had remained undisturbed, and also might infer that the cover slipped or gave way because the defendant's teamster had failed to remove particles of coke which had lodged on the rim, and accordingly that there was *prima facie* evidence of negligence on which the plaintiff was entitled to go to the jury.

In an action of tort for personal injuries alleged to have been caused by the defendant's negligence, the plaintiff must sustain the burden of proving such negligence, but, if he shows circumstances from which negligence of the defendant may be inferred and these circumstances are not explained otherwise, the plaintiff has established a *prima facie* case which entitles him to go to the jury without his excluding every other possible theory as to the cause of the accident.

TWO ACTIONS OF TORT, as stated in the opinion. Writs dated August 19, 1907.

In the Superior Court the cases were tried together before *Stevens*, J., who at the close of the plaintiffs' evidence ordered verdicts for the defendant; and the plaintiffs alleged exceptions.

G. H. Mellen, (*J. B. Vallely* with him,) for the plaintiffs.

H. C. Sawyer, for the defendant.

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BRALEY, J. In walking over a public way * Mrs. Gillis observed a covered coal hole, but as the sidewalk appeared to be safe, she stepped on the cover, when it gave way, causing personal injuries, for which in the first action she seeks compensation, while in the second action her husband asks damages for loss of consortium.

It is settled that her knowledge of the existence of the covered hole and her failure to avoid it in passing would not as matter of law preclude recovery, as the question whether she used ordinary care would be for the jury. *Wakefield* v. *Boston Coal Co.* 197 Mass. 527.

But, if it could be found that her conduct was not careless, the important question for decision is whether there was any evidence that the injury was caused by the defendant's negligence. It was the opinion of the expert witness, whose evidence was properly admitted, that, if the rabbet into which the cover fitted had been properly cleared of coal or coke, the cover when replaced would not tilt but would remain firmly in position. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *Lang* v. *Terry*, 163 Mass. 138. *Tremblay* v. *Mapes-Reeve Construction Co.* 169 Mass. 284. *Leslie* v. *Granite Railroad*, 172 Mass. 468. If, however, this was not done, the cover would partially come out or be thrown up upon pressure. The defendant admitted that, earlier in the day and within a few hours of the accident, its teamster had used the coal hole in making delivery of a load of coke to a customer. If he failed properly to replace the cover, the defendant became responsible for his negligence. *French* v. *Boston Coal Co.* 195 Mass. 334. *Wakefield* v. *Boston Coal Co.*, *ubi supra*. But it contends that from the length of time which elapsed,† with the opportunity thus afforded for others to have disturbed or displaced the cover, the evidence fails to show that its negligence was the efficient cause of the injury.

The burden of proof undoubtedly remained on the plaintiffs throughout the trial, but they were not required to exclude every other possible theory as to what might have caused the accident,

* Temple Place in Boston.

† In the defendant's brief the time elapsed is stated to have been four hours and a half, from 8 A. M. until 12.30 P. M.

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where it could have been found directly attributable to the defendant's fault. *Carroll* v. *Boston Elevated Railway*, 200 Mass. 527. *Cahill* v. *New England Telephone & Telegraph Co.* 193 Mass. 415, 418. In the absence of any satisfactory explanation offered by the defendant, the jury would have been warranted in finding that no other reasonable inference could be drawn from the circumstances except that from the time of its replacement to the moment of the plaintiff's fall the cover had remained undisturbed. *Woodall* v. *Boston Elevated Railway*, 192 Mass. 308, 312. If no intervening cause appeared sufficient to explain the displacement, they also could have inferred that it gave way because particles of coke had become lodged in the rabbet, which the teamster neglected to remove. *Power* v. *Beattie*, 194 Mass. 170, 176. *Silverman* v. *Carr*, 200 Mass. 396.

Having established a *prima facie* case, the plaintiffs were entitled to go to the jury.

Exceptions sustained.

MARY K. KARLSON, administratrix, *vs.* CITY OF BROCKTON.

Plymouth. March 19, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by an administrator against the employer of his intestate for causing his death by reason of a defective maul with which a fellow workman of the intestate was driving into the ground a stake that the intestate was holding for him, where the plaintiff's theory of the accident is that the maul struck the stake squarely and then glanced off and hit the intestate in the head, evidence, that the metal band around the head of the maul was flush with the end, or, if it was not, that the wood was in some places frayed and sticking out, does not tend to show that the injury was caused by the negligence of the defendant, as neither of these things would make the maul glance off after it was landed fairly on the head of the stake.

TORT under the employers' liability act for the death of the plaintiff's intestate on July 14, 1903, from injuries received by him while in the employ of the defendant by being struck in the head by a maul or mallet alleged to have been defective, with which one Scott, a fellow employee of the intestate, was driving

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into the ground a stake that the intestate was holding for him. Writ dated April 29, 1904.

In the Superior Court the case was tried before *Schofield*, J. The work, in which the intestate was employed as a laborer, was being done by the city of Brockton in increasing its water supply at Silver Lake under the authority given by St. 1899, c. 356, and St. 1902, c. 461.

One Dr. Dacey, the physician who attended the plaintiff's intestate from the day he received his injury until the time of his death, after having qualified as an expert, testified in substance that if the maul or mallet had struck the plaintiff's intestate directly it would have crushed his skull; that there was no depression of the bone, and that the wound was a linear fracture about an inch and a half in length; that it appeared to have been cut with a sharp instrument; that a maul like those exhibited could not have caused the wound; that a maul so worn on either side that the wood was worn away flush with the metal rim on the maul would produce the sort of injury found upon the head of the plaintiff's intestate, if the blow struck had been glancing, but that a direct blow, even with such a maul, would not have caused such injury; that something must have spent the force of the blow before it struck the plaintiff's intestate.

Mary K. Karlson, the plaintiff, testified that she saw a maul upon the ground at the well where the accident occurred, and that the iron ring was near the end of the maul and in some places rags or frayed wood was sticking out, and in some no rags at all, but just a clear iron ring right near it.

One Thornell, who was in charge of the work at the time, testified that he took the maul which hit the plaintiff's intestate and threw it off on the bank; and that he saw the maul then on the ground by the well after the accident.

Scott testified that the maul used at the time of the accident had been used five or six weeks; that the maul was one of three exhibited in court.

The defendant called witnesses who described the accident as stated in the opinion.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

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R. G. Kilduff & C. H. Johnson, for the plaintiff.

W. G. Rowe, for the defendant.

LORING, J. We understand that the sole contention made by the plaintiff is that the testimony of the physician warranted a finding that the maul or mallet must have hit the stake and then glanced off and hit the plaintiff in the head. Two witnesses called by the defendant testified that the plaintiff's head got in the line of the sweep of the maul as it descended on to the top of the stake; that the maul hit the plaintiff a glancing blow and then hit the stake. Assuming, however, that in spite of this testimony the physician's testimony warranted the other finding, there is no evidence that the glancing off of the maul after it struck the stake was caused by the condition of the head of the maul. All that could be found was either that the metal band around the head of the maul was flush with the end or head, or that it was not and the wood on the side was frayed. Neither would cause the maul to glance off after it was landed fairly on the head of the stake. For that reason there was no evidence that the injury was caused by the negligence of the defendant.

Exceptions overruled.

WILLIAM GOUDIE *vs.* FRANK H. FOSTER & others.

Suffolk. March 19, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, In a laundry.

One who enters the employ of the proprietor of a laundry in a room where he knows that it is customary to throw water from a "starcher" upon the concrete floor, from which it runs off into a drain, and that small particles or lumps of starch occasionally are held in solution in such water and become deposited upon the floor, making it slippery, and that the floor is constantly wet, assumes the risk of an injury from his slipping because of the starch upon the floor.

A workman entering the employ of one, who is causing work to be prosecuted by his superintendent and employees in a manner obviously dangerous, nevertheless by accepting employment accepts his employer's premises and the methods used by the superintendent and the other employees as he finds them, and neither the employer nor his representative is under any duty to such workman to make any change in such conditions and methods.

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TORT, with counts at common law and under R. L. c. 106, § 71, for injuries received by the plaintiff while in the defendants' employ in a laundry. Writ in the Superior Court for the county of Middlesex dated September 20, 1905. On March 22, 1906, a motion to transfer the case to Suffolk county was allowed, and the case was transferred accordingly.

The case was tried before *Brown*, J. There was evidence tending to show that, as the plaintiff was walking across the concrete floor of the laundry carrying a fringed spread on his right arm, when he was near a drying machine or extractor which was in motion revolving at its usual speed of twelve hundred revolutions a minute, his foot slipped on starch saturated with water, causing him to raise his arms so that the end of the spread was caught in the extractor and his right arm was drawn into it. Other facts are stated in the opinion.

At the close of the evidence, the presiding judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

L. Bryant, (*D. Wright* with him,) for the plaintiff.

W. Rand, for the defendants.

BRALEY, J. We are of opinion that the verdict for the defendant was rightly ordered. The plaintiff upon his own testimony not only had worked in laundries for many years, but was familiar with the mechanical arrangements of the washroom where he was injured. In the location of the various machines and in their adaptation to the work, there were no concealed dangers, and the floor of the room at all times was plainly visible. It also appeared that it was part of the plaintiff's duty to wash the floor weekly, and that, being familiar with the process whereby the clothes were cleansed and laundered, he knew starch was used in the "starcher" from which, when the water was removed and thrown across the floor from whence it ran off into a drain, small particles or lumps of starch occasionally would be held in solution, causing the surface of the floor to become slippery to travel. We find it difficult to see what further enlightenment as to the condition of the ways, works and machinery or their use could have been given. The plaintiff knew of the mode in which the work was conducted, and that the floor from the very nature of the business was more or less constantly wet, and he also must have been aware when walking

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over it that he might slip and perhaps in some way come into contact with the moving machinery. In the most favorable view which can be taken of his evidence, there was no information as to his surroundings that the defendants or their superintendent could have imparted, which he did not already possess or by ordinary observation could not have obtained. *Regan* v. *Lombard*, 192 Mass. 319. If the plaintiff chose to work under these conditions, he assumed at common law the known and obvious dangers incident to his employment, among which was the common and characteristic risk of a slippery floor. *Whittaker* v. *Bent*, 167 Mass. 588. *Thompson* v. *Norman Paper Co.* 169 Mass. 416.

Nor can the action be maintained on the counts under R. L. c. 106, § 71, for alleged negligence of the superintendent in permitting the surface of the floor to become and remain unstable from water and the deposition of starch. The plaintiff, while he did not at any time assume any chance of injury from the negligence of the superintendent, yet, having accepted his employer's premises as he found them, with the method employed to operate the laundry, neither the defendants nor their representative were charged with a duty to him to make any change. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135, 137, 138.

Exceptions overruled.

JOSEPH BROOKS *vs.* KINSLEY IRON AND MACHINE COMPANY.

Norfolk. March 22, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, In a foundry. *Evidence*, Presumptions and burden of proof. *Notice*, Under employers' liability act.

In an action against the proprietor of a foundry by one employed therein as a moulder, to recover for personal injuries caused by an explosion of molten metal which the plaintiff was pouring into a "pig bed" so called, which the defendant had furnished for the purpose, the declaration contained counts both at common law and under R. L. c. 106, § 71, cl. 1, 2. At the trial there was evidence tending to show that rust or dampness in the pig bed would have caused such an explosion as occurred, that it was not the duty of the plaintiff to inspect the pig

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beds for the purpose of ascertaining whether rust or dampness was present, but that he was expected to use the pig beds as he found them, that, while the presence of rust or moisture sufficient to cause such an explosion as that by which the plaintiff was injured would not be obvious to a moulder, it could readily be discovered by proper inspection, that for many years it had been the defendant's practice to keep the pig beds free from rust and moisture by precautions that had been abandoned during the few weeks or months before the accident, during which time the care of them had been intrusted to a new and inexperienced employee to whom no instructions were given and who took no precautions, and that during that time an unusual number of small but harmless explosions had occurred. It did not appear decisively that the plaintiff knew of this change in the practice of his employer. There was no direct evidence of the presence of rust or moisture in the pig bed at or before the time of the explosion. The plaintiff, an experienced moulder, testified that, if it struck a hard substance, molten metal would fly into small particles, although that would do no more than burn the clothing, and that an explosion was liable to occur at any time if a pig bed was not properly kept. There was no evidence that such an explosion as the one in question could have been produced from any other cause than an accumulation of rust or moisture. *Held*, that the questions, whether the explosion by which the plaintiff was injured was caused by the presence of rust or moisture in the pig bed due to negligence of the defendant or of his superintendent, whether the plaintiff was in the exercise of due care and whether he had assumed the risk of the injury, were for the jury.

Where, at the trial of an action for personal injuries alleged to have been caused by negligence of the defendant, there is evidence from which the jury would be warranted in finding actual negligence of the defendant in a certain particular, followed by the existence of the very danger which might have been expected to arise therefrom, it cannot be said as matter of law that the plaintiff is bound to go further and to exclude the operation of other possible causes to which conceivably the danger might have been due instead of having been due to the actual negligence which has been shown.

Where, intending to give a notice under R. L. c. 106, § 75, an employee of a corporation named the K. Company delivers to one who is the corporation's treasurer a letter addressed "To the Treasurer of the K. Company" at the company's place of business, which says "You are hereby notified that, while working for you in your foundry . . . I was seriously injured because of an explosion of hot metal . . . ," such notice is not insufficient by reason of not having been addressed specifically to the corporation.

TORT, with counts at common law and under R. L. c. 106, § 71, cl. 1, 2, for personal injuries received by the plaintiff while in the defendant's employ and alleged to have been caused by an explosion of molten metal which he was pouring from a ladle into a "pig bed," so called, furnished by the defendant for the purpose. Writ in the Superior Court for the county of Norfolk dated December 2, 1905.

The case was tried before *King*, J. The notice under R. L. c. 106, § 75, referred to in the opinion, was as follows:

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"Boston, Mass., November 7, 1905.

"To the Treasurer of the
Kinsley Iron and Machine Company,
Canton, Mass.

"Sir: — You are hereby notified that, while working for you, in your Foundry, at Canton, Mass., on or about the twelfth day of September, A. D. 1905, and while in the exercise of due care, I was seriously injured, because of an explosion of hot metal, while I was placing said hot metal in a cast iron 'pig' or 'ingot,' which 'pig' or 'ingot' was provided by you as a receptacle for surplus metal after 'pouring off,' so called.

"The cause of said injury was: — . . . [Here followed a detailed statement substantially in the language of R. L. c. 106, § 71, cl. 1, 2.]

"(Signed) Joseph Brooks,
By his attorney,
Gerald A. Healy."

Other facts are stated in the opinion.

At the close of the evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

W. R. Bigelow, (*G. A. Healy* with him,) for the plaintiff.

J. E. Cotter & C. Reno, for the defendant.

SHELDON, J. The fundamental question is whether there was evidence which would have warranted the jury in finding that the explosion by which the plaintiff was injured was due to an accumulation of rust or moisture in the pig bed into which the plaintiff was pouring molten iron, and that such accumulation was due to the negligence of the defendant or of some one for whose negligence the defendant was responsible. There was ample evidence that such an accumulation in the pig bed might cause an explosion like what did occur. There was also evidence that for many years, up to a short time before the happening of this explosion, care had been taken to keep the beds free from rust or moisture by taking out the iron each morning, placing them upside down upon two iron rails until they were needed for use, and rubbing any spot of rust with a black oil which was provided for that purpose; but that for a few weeks or months before the explosion this practice had been abandoned; that the care of these beds had been intrusted to a new and in-

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experienced employee, to whom no instructions were given, and who formed the habit of taking out the iron each morning and putting the beds upon the bare ground without any other attention. He was never, in any way, according to the evidence put in by the plaintiff, instructed to look for rust or moisture in them, or to take any precautions against its gathering. This change of practice was followed by an increased number of small but harmless explosions. And there was evidence that such an accumulation of rust or moisture as would create danger of a violent explosion, while it was not obvious to the moulder, whose duty it would be to pour molten iron into the bed, could readily be discovered by proper inspection made beforehand. It also could be found that the plaintiff and the other moulders were not charged with the duty of making such inspection, but were expected to use the beds as they found them, and that they had a right to rely upon proper care having been taken to keep them free from rust or moisture.

On the other hand there was no direct evidence of the presence of rust or moisture in the bed, at or before the time of the explosion. The plaintiff testified that moulten iron would fly in small particles, if it struck any hard substance like the ground, or still worse, upon a board, although this would not do more than burn the clothing; that an explosion was liable to occur at any time if a vat or pig bed was not properly kept. Other witnesses testified to the same effect. But there was no evidence that such an explosion as was testified to could have been produced from any other cause than an accumulation of rust or moisture. Accordingly, we are of opinion that the jury might have found that the explosion was due to such an accumulation. Indeed there was direct evidence that such an explosion could not have been due to any other cause.

But it is objected that this is not enough. If the existing state of affairs, however dangerous, might, according to the ordinary experience of mankind, have been due to other causes than negligence for which the defendant was responsible, then it was for the plaintiff to exclude the operation of those causes by the greater weight of evidence. *Ryan* v. *Fall River Iron Works Co.* 200 Mass. 188, 192. *Childs* v. *American Express Co.* 197 Mass. 337, 339. *Saxe* v. *Walworth Manuf. Co.* 191 Mass.

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338, 341. *Hofnauer* v. *R. H. White Co.* 186 Mass. 47, 49. But these beds might be found to be a part of the defendant's ways, works and machinery. *Prendible* v. *Connecticut River Manuf. Co.* 160 Mass. 131. *Donahue* v. *Buck*, 197 Mass. 550. And the case at bar differs from those above referred to and similar cases, in that here there was positive evidence of negligence on the part of the defendant or its superintendent in discontinuing the precautions which had been taken to guard against this very danger, and of negligence which naturally would result in just such a dangerous condition of the beds as was claimed to exist. Where the jury have a right to find such actual negligence, followed by the existence of the very danger which might have been expected to arise therefrom, it cannot be said as matter of law that the plaintiff is bound to go further and to exclude the operation of other possible causes to which conceivably the danger might have been due, instead of having been due to the actual negligence which has been shown. We are not aware of any decision which has gone to that length. There was here more than a mere transitory risk arising from a temporary dampness, to be dried or wiped out by the man who was in charge of them, as in *Whittaker* v. *Bent*, 167 Mass. 588. These were permanent appliances; and the jury might find that the defendant had assumed the duty of inspecting them and keeping them dry and free from rust, and then, without notice or warning to the plaintiff, had abandoned the practice upon which he had become accustomed and had the right to rely. *Donahue* v. *Buck*, 197 Mass. 550, 552. *McCabe* v. *Shields*, 175 Mass. 438. There was evidence of a latent defect which the defendant ought to have discovered and guarded against. *Smith* v. *Thomson-Houston Electric Co.* 188 Mass. 371, 375. *Murphy* v. *Marston Coal Co.* 183 Mass. 385, 388. It was the duty of the defendant to provide reasonably safe and suitable appliances which, when used in the ordinary manner, would not involve unusual risks to its servants. *Morena* v. *Winston*, 194 Mass. 378, 384. *Erickson* v. *American Steel & Wire Co.* 193 Mass. 119, 126. *Littlefield* v. *Edward P. Allis Co.* 177 Mass. 151.

The plaintiff might have been found to have been himself in the exercise of due care. Although an expert moulder of very

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long experience and thoroughly familiar with the dangers of his employment, yet he did not assume the risk of negligence on the part of the defendant or of those fellow servants for whose negligence, under R. L. c. 106, § 71, the defendant was responsible. *Meagher* v. *Crawford Laundry & Machinery Co.* 187 Mass. 586, 589, and cases cited. He was not bound to guard against the existence of any hidden danger in the beds which would not have existed if proper care had been taken of them. *Myers* v. *Hudson Iron Co.* 150 Mass. 125, 134. As already has been said, he was not himself charged with any care over them, or any duty to inspect them. And such examination as he was able to make at the time of pouring, it could have been found, would not have disclosed to him the existence of any danger. *Donahue* v. *Buck*, 197 Mass. 550, 553. *Redmund* v. *Butler*, 168 Mass. 367.

For the same reasons, he did not assume the risk of an accident like this. *Wagner* v. *Boston Elevated Railway*, 188 Mass. 437, 441. He cannot be prevented from recovering on the ground that, by continuing to work after he knew that the precautions formerly taken had been abandoned, he assumed the risks arising from such employment, as in *McTiernan* v. *American Woolen Co.* 197 Mass. 238. It does not decisively appear that he had such knowledge. It is the fact, as the defendant's counsel say in their brief, that it did not appear conclusively "when first, or for how long a time, the pig beds had been kept on iron rails, nor why [or when] the iron rails were done away with and the pig beds kept on the ground." These questions were for the jury.

The notice given under the provisions of R. L. c. 106, § 75, was addressed "to the treasurer" of the defendant, and was delivered in hand to the person who was then its treasurer. Even taking into account the contents of the notice, the jury would have had a right to find that this notice was addressed to and served upon the defendant through its treasurer. *Shea* v. *New York, New Haven, & Hartford Railroad*, 173 Mass. 177. *De Forge* v. *New York, New Haven, & Hartford Railroad*, 178 Mass. 59. *McCabe* v. *Cambridge*, 134 Mass. 484. And see *Produce Exchange Trust Co.* v. *Bieberbach*, 176 Mass. 577, 589, 590.

The case is close; but in our opinion it should have been submitted to the jury.

Exceptions sustained.

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GEORGE F. VIETOR & others *vs.* CHARLES E. SPALDING & others.

Suffolk. March 23, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Partnership, Notice of retirement of partner. *Notice*. *Agency*, Undisclosed. *Attorney at Law*.

Where one copartnership, which has been selling merchandise for several years to another copartnership, adds new members to its firm without giving any notice to the buying copartnership, and subsequently one member of the buying copartnership retires by agreement and no notice is given to the selling copartnership, which a year after such retirement gives to the buying copartnership notice of the additions to its firm and then continues to sell goods to the buying copartnership and in so doing relies in part upon the credit of its retired partner, such retired partner is liable with his former copartners for the purchase price of such goods, and, if it was not known to the retired partner who were the members of the selling copartnership, such fact does not affect his liability.

The decision reported in *Vietor* v. *Spalding*, 199 Mass. 52, to the effect that an attorney at law who is retained generally by a client but, at the time of his receiving notice of the dissolution of a partnership with which his client has business dealings, is not acting on behalf of his client in any matter, has no authority to receive such notice on behalf of his client, affirmed.

CONTRACT upon an account annexed for merchandise alleged to have been sold to the defendants by the plaintiffs. Writ in the Municipal Court of the City of Boston dated September 17, 1902.

The case was previously before this court, when it was held in a decision reported in 199 Mass. 52, that, upon the evidence introduced at a previous trial, a notice to W. A. Knowlton, Esquire, was not a notice to the plaintiffs of the withdrawal from the defendants' firm of the defendant Atwood.

The case was tried again before *Pierce*, J. Besides the facts stated in the present opinion, it appeared that the sales of goods for which recovery was sought occurred at various times between February 21, 1900, and August, 1900, and that the two firms or their predecessors had had business relations since 1894.

As to the notice referred to in the third question to the jury, the bill of exceptions states: "The plaintiff firm on the first of January, 1898, took into copartnership two new members, to

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wit: Thomas F. Vietor and Thomas Schmidt. The plaintiffs gave no notice to the defendant Atwood, to the public nor to C. E. Spalding & Company of this admission of these two partners, nor had they any knowledge thereof except that a written notice was put in evidence given on January 2, 1900, that Schmidt and Thomas F. Vietor were admitted to the plaintiff firm on January 2, 1900, which contained their authorized firm signatures. This was a year after the retirement of Atwood from the defendant firm, and more than a month before the plaintiff began the sale and delivery of the goods sued for."

The following questions were submitted to the jury by the presiding judge, and answered by them:

"1. Did Atwood retire from the firm of C. E. Spalding and Company on January 1, 1899, or July 1, 1899?" Ans. "January 1, 1899."

"2. Did the plaintiffs rely upon the responsibility of Atwood with the other partners of C. E. Spalding and Company in giving credit to the firm of C. E. Spalding and Company?" Ans. "Yes."

"3. Did Atwood or C. E. Spalding and Company ever receive any notice of the admission of Thomas Schmidt and Thomas F. Vietor to the firm of Vietor and Achelis prior to the written notice dated January 2, 1900?" Ans. "No."

"4. Were Thomas F. Vietor and Schmidt admitted to the plaintiff firm in 1898 or 1900?" Ans. "In 1898."

The defendants stipulated that the plaintiffs would "not be put to proof of sale and delivery and value of the items set forth in their declaration." The presiding judge thereupon ordered a verdict for the plaintiffs; and the defendant Atwood alleged exceptions.

W. F. Kimball, for the defendant Atwood.

W. A. Knowlton & S. H. Tyng, for the plaintiffs, submitted a brief.

BRALEY, J. The defendant Atwood, being a member of a mercantile partnership composed of himself and the other defendants, to which from time to time the plaintiff firm sold merchandise in the usual course of trade, withdrew therefrom without giving to them notice of his retirement. In ignorance of his withdrawal, the plaintiffs, having sold goods to Atwood's

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former associates by whom the business was continued without any external change, seek in this action to hold him liable for the price jointly with them. It may be assumed that, before the change the plaintiffs transacted business with the firm on the faith of having Atwood's credit to look to in payment of debts. If commercially bound by the firm name while a member, he remained bound under the same designation until the plaintiffs, who in good faith dealt with the apparent partnership, had been actually notified of his retirement. *Stimson* v. *Whitney*, 130 Mass. 591. *Elkinton* v. *Booth*, 143 Mass. 479.

In bar of this liability it is urged first that before the present indebtedness was contracted the constituency of the plaintiff firm had been changed by the admission of new members, and that, as Atwood was not then a member of the defendant firm, he could not be held, because credit could not have been extended on the strength of his membership. But the plaintiff firm had undergone no internal transformation which destroyed its rights as a creditor, for in contemplation of law this defendant still held himself out as associated with his former partners. Nor was he exonerated even if uninformed of this change. A partnership like any undisclosed principal may enforce in the name of its members the collection of bills receivable, even if the contract was made by one of their number. It is no defense that they were unknown to the debtor, or that he was ignorant of the firm title or existence, although where the business of the firm has been ostensibly conducted in the name of one of the partners, the debt or claim, for purposes of set-off, recoupment, and payment, may be treated as his sole property. *Wood* v. *O'Kelley*, 8 Cush. 406. *Scott* v. *McKinney*, 98 Mass. 344, 348. *Wright* v. *Herrick*, 125 Mass. 154. Upon the evidence the defendants traded with the plaintiff partnership as it then was constituted.

It is urged next that the plaintiffs should be held chargeable with notice of the withdrawal, because of the knowledge of this fact by Mr. Knowlton, an attorney at law, who at the time was acting as their general counsel. But as to this issue a full examination of the record shows that the testimony in all essential particulars is the same as at the former trial where it was decided that the knowledge of the attorney was not binding

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on the plaintiffs, as he was not their agent for this purpose. *Vietor* v. *Spalding*, 199 Mass. 52.

The defendant's liability having been established by the answers returned by the jury to the questions submitted to them, a verdict for the plaintiffs was ordered rightly.

Exceptions overruled.

THOMAS P. CAIN *vs.* HUGH NAWN CONTRACTING COMPANY.

Suffolk. March 24, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Agency, Existence of relation, Scope of authority or employment.

At the trial of an action for personal injuries received by the plaintiff from driving upon a pile of loose dirt negligently left in a public way by the driver of a dump cart, there was evidence tending to show that when he thus left the dirt the driver of the dump cart was engaged in hauling dirt which the defendant was taking from an excavation, and was subject to the defendant's orders as to whither he should take it, that the team he was using was owned by a person who employed and paid him and from whom for a stipulated price the defendant hired the team with the driver, and that the owner gave the driver no directions from the time when he drove the team to the defendant's work until he returned. *Held*, that the inferences which should be drawn from the evidence as to the relations of the driver of the dump cart and the owner of the team and the defendant were not matters of law but questions of fact to be decided by the jury under suitable instructions; and that they were warranted in finding that the driver while hauling the dirt was acting solely as the servant of the defendant.

If, while the driver of a dump cart is hauling dirt to a destination designated by his employer along a public way, the dirt is dumped into the way either by a deliberate act of the driver or because of a defect in the cart, which is not owned by the employer, and the driver then fails to take the dirt to the destination designated, but negligently leaves it in the way, such negligent act of the driver is within the scope of his employment, and his employer is liable for injuries resulting therefrom to one lawfully travelling upon the way.

TORT for personal injuries received by the plaintiff while he was driving a hansom cab on Falmouth Street in Boston, and due to the cab's tipping over because it ran upon a pile of dirt alleged to have been left there negligently by an employee of the defendant. Writ in the Superior Court for the county of Suffolk dated November 1, 1905.

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The case was tried before *Stevens*, J. There was evidence tending to show that Beckwith, mentioned in the opinion, was hauling dirt, which the defendant took from an excavation it was making at the corner of Washington Street and Avon Street in Boston, from that point to the "Fenway Dump." While going down Falmouth Street toward Massachusetts Avenue, his load was dumped into the street. There was evidence tending to show that the load was dumped because a pin was lost from the cart, and also evidence tending to show that Beckwith deliberately dumped it. It was the pile of dirt thus caused that the plaintiff drove upon when his cab tipped over. Other material facts are stated in the opinion.

At the close of the plaintiff's evidence, the defendant rested and requested the presiding judge to give eleven rulings, which in substance were that there was no evidence that Beckwith was a servant of the defendant or under its management or control, and that there was no evidence that, when he committed the act of negligence which caused the plaintiff's injury, he was acting within the scope of his authority.

The presiding judge refused to rule as requested, the jury found for the plaintiff; and the defendant alleged exceptions.

T. Hunt, for the defendant.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

BRALEY, J. While not expressly conceded, the plaintiff's due care was not controverted at the argument, and the question for decision is, whether there was any evidence for the jury of the defendant's negligence.

The accident occurred about midnight, by the plaintiff's carriage coming into collision with a pile of loose earth left unguarded in a public way by one Beckwith, while employed as a driver of a tip cart in hauling earth excavated by the defendant to a dump, where it was to be unloaded. It appeared from the evidence introduced by the plaintiff that the team was owned by one Woodbury, by whom Beckwith was employed and paid, and under whose orders the team had been driven to the subway where the earth was to be taken on and removed. The testimony of Woodbury showed that the defendant for a stipulated price had hired the team with the driver, and that, after the team left at night and until its return in the morning, during

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which time the work was to be performed, he gave no directions to the driver.

If until he arrived at the subway the driver was the general servant of another, upon arrival and during the period of service, he received and obeyed orders when to load and where to go from the defendant's foreman. It may be assumed that, so far as reasonably necessary to care for and preserve the property, the driver as the owner's representative retained control of the team. *Kimball* v. *Cushman*, 103 Mass. 194. *Huff* v. *Ford*, 126 Mass. 24. The inferences which should be drawn from the evidence as to the relations of Beckwith to Woodbury and to the defendant were not matters of law as the defendant contends, but questions of fact to be decided by the jury under suitable instructions. *Preston* v. *Knight*, 120 Mass. 5, 8. *Driscoll* v. *Towle*, 181 Mass. 416. *Bowie* v. *Coffin Valve Co.* 200 Mass. 571.

When the ordinary test where a servant has been hired or lent to another is applied to ascertain whether at the time of the accident Beckwith was engaged in the defendant's work or in the service of his general employer, there was evidence from which the jury could find that, within the designated period, he was subject only to the authority of the defendant, to whose control he had voluntarily submitted himself. If they so determined, then Woodbury correspondingly had relinquished any right to command his movements while thus engaged, and a further inference, that in the matter of transportation he acted solely as the defendant's servant, would have been warranted. *Coughlan* v. *Cambridge*, 166 Mass. 268. *Driscoll* v. *Towle*, 181 Mass. 416. *Delory* v. *Blodgett*, 185 Mass. 126. *Oulighan* v. *Butler*, 189 Mass. 287, 290, 291. *Bowie* v. *Coffin Valve Co.* 200 Mass. 571. *Standard Oil Co.* v. *Anderson*, 29 Sup. Ct. Rep. 252.

But if he could be found to have become the defendant's servant, it is urged that he was not acting within the scope of his employment in leaving either the whole or a part of the load in the street. A master is liable for the wrongs committed by the servant when done in the prosecution of the master's business, but if the servant departs from his employment for purposes of his own, he alone is responsible for his tortious acts. The company in using the public ways for the prosecution of its business

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could not render them dangerous and unsafe without being liable in damages to travellers who were injured. It undoubtedly was the duty of Beckwith, to whom the transportation had been intrusted, to proceed to the place of destination and not to leave the earth in the street, yet his failure, while in transit, to obey the order does not exonerate the defendant. *George* v. *Gobey*, 128 Mass. 289. *Grant* v. *Singer Manuf. Co.* 190 Mass. 489. In leaving a portion of the earth where it had fallen, when the whole could have been removed, he was still about the defendant's affairs and acting within the limits of his employment, whether the load had been deposited through the accidental loss of the pin causing the cart automatically to unload, or because he dumped its contents. *Hayes* v. *Wilkins*, 194 Mass. 223. The defendant accordingly must be held responsible for the injury to the plaintiff.

Exceptions overruled.

WALTER FRENCH, administrator, *vs.* CHARLES W. SABIN, JR.

Norfolk. March 24, 25, 1909. — May 21, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Causing death, Due care of decedent. *Evidence*, Relevancy.

At the trial of an action against one operating an electric light system, to recover for the death of the manager of a telephone exchange who was alleged, while in the discharge of his duties he was upon a pole upon which were telephone wires and wires of the defendant, to have received a shock from electricity communicated to him from uninsulated portions of the defendant's wires, it appeared that the general conditions of danger upon the pole were manifest and that the decedent either knew or in the exercise of reasonable prudence should have known of them; and there was evidence tending to show that the decedent had completed his work and was ready to descend, and that later he gave an outcry of distress and was seen falling from the pole; but there was no evidence to show what act of his brought him into contact with the defendant's wires. The presiding judge ordered a verdict for the defendant. *Held*, that the verdict was ordered rightly, since the question, whether or not at the time when he was injured the plaintiff's intestate was in the exercise of due care, was left on the evidence entirely a matter of conjecture.

At the trial of an action to recover for the death of the plaintiff's intestate, testimony of a witness tending to show that the decedent generally had been a competent and careful man in the opinion of the witness is not admissible to show that at the time when he was injured he was in the exercise of due care.

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TORT for the death of the plaintiff's intestate. Writ in the Superior Court for the county of Norfolk dated January 4, 1906.

The case was tried before *Dana*, J. It appeared that the plaintiff's intestate, at the time when he met his death, was the manager of the telephone exchange of the New England Telephone and Telegraph Company at Randolph. Other facts are stated in the opinion.

At the close of the plaintiff's evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

G. W. Anderson, (*E. H. Ruby* with him,) for the plaintiff.

E. K. Arnold, (*W. B. Luther* with him,) for the defendant.

BRALEY, J. The accident causing the injury and death of the plaintiff's intestate resulted from an electrical shock, received while he was adjusting a telephone wire connecting the house of a subscriber with the main line. If it be assumed that there was evidence of the defendant's negligence arising from the defective insulation of the electric lighting wires with which the decedent while at work came in contact, the plaintiff was bound to offer some evidence from which the jury could find that his intestate was in the exercise of due care. In substance the evidence when examined tended to prove that, for some years previously and at the time of his death, the decedent was employed by a telephone company whose wires were strung on crossarms of the poles which also supported the wires of the defendant's electric lighting system. It having become necessary to make the connection for the subscriber, he left the central office taking a test box with other tools, and went to a pole opposite the premises, which he was seen to ascend. While this pole had been set in the place of an old pole, which had been cut off at the ground, the old pole still supporting both sets of wires had been attached to the new pole by a guy wire, and according to the evidence of the plaintiff's expert electrician, all the apparatus was in proper repair except the lighting wires, carrying at the time a current of eleven hundred volts. A tie wire by which one of the lighting wires was attached to the insulator on the side of the pole where the intestate would have to perform his work had an uninsulated projecting point, and the insulation on these wires also had been worn off in many places

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by friction with the branches of the trees through which they ran. The expert evidence very plainly showed that if a person ascended the pole to the height required, and his body touched the bare wire and the telephone wire or guy wire simultaneously, or, as the lighting wires where they touched the trees had become grounded, if he came into contact with them, a circuit through his body would be complete and he would receive an electrical shock insufficient to cause death, but producing temporary paralysis owing to loss of muscular control. It was into this field of manifest danger, whose general conditions he either knew or in the exercise of reasonable prudence should have known, that the decedent entered. But if from his knowledge and skill, gained from previous experience, he well might have appreciated the perils of his position, there is no evidence as to his movements just before he received the shock and fell to the ground. The only witness of his conduct at the pole saw him ascend until he disappeared from view in the foliage. It may be inferred from the telephone wires being afterwards found connected and from his calling the office and talking with the operator, that, his work having been completed, he was ready to descend, but beyond this point of time everything is left to conjecture. If it is true that this witness also happened to hear the conversation and heard immediately after an outcry of distress and saw him falling through the branches of the trees, what preceding act either of omission or commission brought him in touch with the current is wholly problematical. It would serve no useful purpose to enter upon any discussion as to what he possibly may have contemplated or may have done, preparatory to a descent or change of position, for, not being based on any positive evidence, direct or circumstantial, any supposition would be inconclusive and wholly insufficient to supply the requisite proof.

The plaintiff, realizing this dilemma, invokes the familiar rule that due care may be proved if enough circumstances appear from which the jury can infer that nothing in the conduct of the plaintiff contributed to his injury. *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276. But, as we have said, all the circumstances do not appear, as the conduct of the decedent at the moment when he received the shock cannot be inferentially

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supplied. *Donaldson* v. *New York, New Haven, & Hartford Railroad*, 188 Mass. 484, 486, and cases cited. *McCarty* v. *Clinton Gas Light Co.* 193 Mass. 76. *Lizotte* v. *New York Central & Hudson River Railroad*, 196 Mass. 519. *Brodie* v. *Rockport Granite Co.* 197 Mass. 147.

The exceptions to the exclusion of evidence may be briefly noticed. It was wholly irrelevant whether the decedent generally was a competent and careful man in the opinion of the witness whose answer, that he had "always noticed him so in that vicinity," was excluded. Proof of previous acts of due care when engaged in his work had no tendency to prove that he was careful on the day of the accident. Having failed to offer any affirmative evidence of his intestate's carefulness, the plaintiff was not harmed by the exclusion of the testimony as to the defective condition of the defendant's wires in other places, or of the system as a whole, or of the conversation of the defendant's superintendent.

Exceptions overruled.

CHARLES H. HILL *vs.* SAMUEL W. WILEY.

Middlesex. March 4, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Conversion. Evidence, Materiality.

In an action of tort for the conversion of a promissory note payable to the plaintiff and not indorsed by him, the plaintiff testified that he lent the note to the defendant to enable the defendant to exhibit it in a transaction with the maker of the note in which the plaintiff was concerned, and that the defendant afterwards without authority surrendered the note to the maker. The defendant testified that the plaintiff delivered the note to him in part payment for certain real estate. It appeared that the plaintiff had retained certain real estate and personal property which had been conveyed and transferred to him as collateral security for the note, and that the maker of the note brought a suit in equity against the plaintiff, alleging that the note had been satisfied and praying for a decree ordering the return of the collateral. The defendant in the action for conversion offered to prove that in the suit in equity brought by the maker of the note against the present plaintiff the maker alleged that the defendant in the present case had surrendered the note to the maker after having acquired it from the plaintiff in the present case in part payment for real estate, that a master to whom the case was referred found these allegations to be true, and that his find-

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ing was confirmed by the judge who heard the case, who made a decree ordering the plaintiff in the present case to convey and transfer the collateral to the maker of the note, and that the plaintiff in the present case obeyed the decree and surrendered the collateral without taking an appeal. The presiding judge in the action for conversion excluded the evidence thus offered on the ground that it was immaterial. It did not appear that the defendant expressly offered in evidence the record of the suit in equity. *Held*, that the court must assume that, if the record of the suit in equity had been admitted, it would have appeared that the plaintiff in the present case in his answer in the suit in equity had alleged that he was still the owner of the note and so was entitled to the collateral, and that this was a material fact, because if he chose to assert his title to the note as still his property, that position was on its face inconsistent with bringing the present action for the conversion of the note; so that the evidence offered should have been admitted.

TORT for the alleged conversion of a promissory note dated February 7, 1902, for $4,825, payable to the plaintiff four months after date and signed by Michael C. Hayes and Mary J. Hayes. Writ dated May 8, 1907.

In the Superior Court the case was tried before *Bond*, J. The facts as they appeared by the bill of exceptions are stated in substance in the opinion. The defendant asked the judge to give certain instructions to the jury, which the judge refused to do, and submitted the case to the jury with other instructions under which they returned a verdict for the plaintiff in the sum of $5,317.15. The defendant alleged exceptions, including an exception to the exclusion of certain evidence, which is described and dealt with in the opinion.

S. H. Tyng, for the defendant.

P. D. Emmons, for the plaintiff.

LORING, J. The facts of this case as set forth in the bill of exceptions seem to be in substance as follows:

In February, 1902, one Michael Hayes and his wife signed a negotiable promissory note payable to Hill, the plaintiff, and delivered it to him. The note was secured by a "deed of the estate No. 49 Fairfax Street, West Newton," a mortgage on furniture, and some shares in a water company.

Five years later, in February, 1907, the plaintiff handed this note to the defendant in connection with the purchase by the plaintiff from the defendant of a machine shop in Billerica then conveyed by the defendant to the plaintiff.

The plaintiff testified that he lent the note at that time to the

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defendant, at the defendant's request, to enable him to deal with Hayes (one of the two makers of the note) who had held an option giving him (Hayes) a right to buy the machine shop then conveyed to the plaintiff. The plaintiff's story was that the defendant said that he was afraid that Hayes might make trouble for him (the defendant) for having conveyed the machine shop to the plaintiff, and in case he (Hayes) should do so he (the defendant) could defend himself by exhibiting to him this note signed by him (Hayes.)

The defendant testified that the Hayes note was delivered to him (the defendant) as part of the purchase money of the machine shop.

When the Hayes note was handed by the plaintiff to the defendant it was not indorsed by the plaintiff nor was the collateral delivered to the defendant.

At some subsequent period not stated in the bill of exceptions, the defendant delivered the note to Hayes the maker. It does not appear from the bill of exceptions that the defendant received any consideration for the delivery of this note to Hayes. It is stated that the defendant testified "that that cancelled Hayes' indebtedness to him," and that he, the defendant, "intended him (Hayes) to have said $4,825 note for all time."

Subsequently Hayes and his wife brought a bill in equity against Hill, in which it was alleged that Wiley received their note from Hill as part of the purchase price of the machine shop, and we assume (although it is not so stated in terms in the bill of exceptions) that Wiley transferred it to them for value, and that under those circumstances they were entitled to the collateral belonging to the note. The judge so found and entered a decree directing Hill to convey and deliver the collateral to Hayes and his wife. Hill did so in compliance with that decree.

If Hill is right in his contention that he lent the note to Wiley and the title to it never left him, he had a right to treat the delivery of the note by Wiley to the maker as a conversion of it by Wiley or he could at his election ignore the fact that the note had come into the possession of the maker through the unauthorized action by Wiley and assert his rights as still the owner of it. The two positions are on their face at least incon-

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sistent one with the other. It is on its face at least inconsistent to bring an action both against Wiley for conversion of the note and against Hayes and his wife on the note as still his property. In place of the plaintiff's bringing an action on the note against the makers, the makers brought a bill against him alleging that the note had been satisfied. When that was done the plaintiff here could have set up in his answer there that he was still the owner of the note and as such was entitled to the collateral, or he could have treated Wiley's delivery of the note as a conversion, in which case he had no interest in the collateral.

The bill of exceptions does not state in terms which of these two positions was taken by the plaintiff in his answer to the bill brought against him by Hayes and his wife, although the inference is very strong that he did the former. Assuming that to be so, the position taken by the plaintiff here in his answer to the bill in equity brought by Hayes and his wife is at least evidence of a position taken by the plaintiff in the suit in equity inconsistent with the position here taken, and the evidence of it should have been admitted.

The exception taken by the defendant to the exclusion of evidence as to the suit brought by Hayes and his wife against Hill was not to the exclusion of the record of that cause. That does not seem to have been offered in terms. The statement of the bill of exceptions on this point is in these words: "In putting in his testimony, counsel for the defendant [Wiley in this action] offered to show that, in their bill in the equity suit above mentioned, the plaintiffs (Hayes and his wife) claimed that Wiley had conveyed this note to one of the plaintiffs; that he had received it as part of the consideration for the deed to Hill; that the master, to whom the case had been referred, so found; and upon that finding being confirmed, the court entered a decree requiring Hill to deliver up the collateral to Hayes, which Hill, without taking an appeal, did. The court excluded the evidence so offered, on the ground that it was immaterial, and the defendant excepted.'

It is pretty plain that there has been a mistrial in the case at bar. The doubt we have is whether, having regard to the rule that the excepting party must show error, the case should be sent back for a new trial. On the whole we are of opinion that this

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course ought to be taken; for on this bill of exceptions we are of opinion that we ought to assume that if the record of the suit brought by Hayes and his wife against Hill had been admitted, it would have appeared that Hill in his answer claimed that he was still the owner of the note and so entitled to the collateral; and that the case at bar was tried on the theory that that fact was of no consequence.

Exceptions sustained.

EDWARD J. VICKERY *vs.* JOHN RITCHIE, JR.

Suffolk. March 5, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Contract, Implied in law, Building contract.

Where, through a mutual honest mistake of the parties to a supposed contract for the construction of a building by one of them upon the land of the other, the building is erected in good faith without any express contract having been made between them, he who furnished the labor and materials at the request of the landowner may recover from him their fair market value, irrespective of the value which the erection of the building has or has not added to the land.

A fraudulent architect prepared an instrument purporting to be a contract in duplicate between the owner of a lot of land and a contractor for the construction of a Turkish bath house on the land. By means of a fraudulent shifting of typewritten sheets the instrument, when signed by the contractor, named as the contract price about $33,500 and, when signed by the landowner, named as the contract price about $23,000. The instrument finally delivered to the contractor named the larger figure and that delivered to the owner the smaller one. The architect made all the payments for the owner and by repeated fraudulent representations prevented a discovery of the discrepancy between the two writings until the building was substantially completed. The contractor and the owner each acted honestly and in good faith, relying on the statements of the architect. The owner paid the price named in the instrument held by him, and the contractor sued him for a balance of about $10,500 alleged to be due to him. An auditor found that the market value of the labor and materials furnished by the plaintiff was $33,499 and that their total cost to the plaintiff was $32,950. He found also that the land and building had cost the defendant much more than their market value, and that the increase of the market value of the land by the structure which the plaintiff had put upon it was only $22,000. *Held*, that the plaintiff and the defendant were mistaken in supposing that they had made a contract for the construction of the building, because their minds never met, but that, the labor and materials having been furnished to the defendant at his request, and such request in legal effect not being limited to the amount of $23,000 which he thought was the price that he had agreed to pay for the completed building, the plaintiff could recover on a *quantum*

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meruit the fair value of the labor and materials thus furnished, and the fact that the increase in the value of the defendant's property from the construction of the building was about $11,500 less than the value of the labor and materials furnished by the plaintiff had no effect upon the amount to be recovered. *Gillis* v. *Cobe*, 177 Mass. 590, discussed and distinguished.

CONTRACT for a balance of $10,467.16 alleged to be due for the erection of a Turkish bath house upon land of the defendant on Carver Street in Boston, with a count upon an alleged contract in writing and another count upon an account annexed. Writ dated January 9, 1904.

In the Superior Court the case was referred to Clarence H. Cooper, Esquire, as auditor. He filed a report containing the findings which are stated in the opinion. The case afterwards was tried before *Pierce*, J. The defendant introduced no evidence. At the close of the plaintiff's evidence the judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

R. W. Light, for the plaintiff.

E. F. McClennen, for the defendant.

KNOWLTON, C. J. This is an action to recover a balance of $10,467.16, alleged to be due the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract the defendant's signature was attached, and the contract price therein named was $33,721. When the defendant signed them the contract price stated in each was $23,200. Until the building was completed the plaintiff held a contract under which he was to receive the larger sum, while the defendant held a contract for the same work, under which he was to pay only the smaller sum. This resulted from the fraud of the architect who drew the contracts, and did all the business and made all the payments for the defendant. The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written, before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good

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faith, trusting the statements of the architect. The architect was indicted, but he left the Commonwealth and escaped punishment.

The auditor found that the market value of the labor and materials furnished by the plaintiff, not including the customary charge for the supervision of the work, was $33,499.30, and that their total cost to the plaintiff was $32,950.96. He found that the land and building have cost the defendant much more than their market value. The findings indicate that it was bad judgment on the part of the defendant to build such a structure upon the lot, and that the increase in the market value of the real estate, by reason of that which the plaintiff put upon it, is only $22,000. The failure of the parties to discover the difference between their copies of the contract was caused by the frequently repeated fraudulent representations of the architect to each of them.

The plaintiff and the defendant were mistaken in supposing that they had made a binding contract for the construction of this building. Their minds never met in any agreement about the price. The labor and materials were furnished at the defendant's request and for the defendant's benefit. From this alone the law would imply a contract on the part of the defendant to pay for them. The fact that the parties supposed the price was fixed by a contract, when in fact there was no contract, does not prevent this implication, but leaves it as a natural result of their relations. Both parties understood and agreed that the work should be paid for, and both parties thought that they had agreed upon the price. Their mutual mistake in this particular left them with no express contract by which their rights and liabilities could be determined. The law implies an obligation to pay for what has been done and furnished under such circumstances, and the defendant, upon whose property the work was done, has no right to say that it is not to be paid for. The doctrine is not applicable to work upon real estate alone. The rule would be the same if the work and materials were used in the repair of a carriage, or of any other article of personal property, under a supposed contract with the owner, if, through a mutual mistake as to the supposed agreement upon the price, the contract became unenforceable.

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This rule, that labor and materials furnished for a person at his request are to be paid for, prevails unless there is something in the circumstances or in the relations of the parties to rebut the ordinary presumption, as when the parties are husband and wife, or parent and child, living together in the same family, or when there is something else to indicate that the service is gratuitous. In a case like the present, when the understanding and agreement is that payment shall be made, it would be absurd to say that nothing should be paid because of a failure, through a misunderstanding, fully to agree.

The principle has often been applied when the ground for an implication of an agreement to pay was much less strong than in the present case. In *Butterfield* v. *Byron*, 153 Mass. 517, where the owner was to do a part of the work in the erection of a building, and a contractor was to do the rest under an express contract for an agreed price, it was held that, when the building was destroyed by lightning, so that the contract became impossible of performance, the contractor might recover, on a *quantum meruit* the fair value of the labor and materials that he had furnished. This was on the ground that, when the contract came to an end without the fault of either party, there was an implication that what was furnished was to be paid for, and if it could not be paid for under the contract it should be paid for on a *quantum meruit*. The same thing had been held previously in *Cleary* v. *Sohier*, 120 Mass. 210. As was pointed out in *Butterfield* v. *Byron*, page 524, the rule is analogous in principle to the right to recover on a *quantum meruit* for that which has been paid or furnished under an express contract, when there is a failure of the consideration. In the present case the labor and materials were furnished for a consideration supposed by both parties to exist in the form of an agreement by the defendant to pay a stipulated sum. Through the mistake of both parties there was no agreement, and that which was thought to be a valuable consideration failed. What was furnished to the defendant, in accordance with an agreement of both parties on the faith of this supposed consideration, must be paid for when the supposed consideration fails. The principle was applied and restated in *Angus* v. *Scully*, 176 Mass. 357. The rule was said to be "that where one is to make repairs or do any

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other work on the house of another, under a special contract, and his contract becomes impossible of performance on account of the destruction of the house, without any fault on his part, then he may recover for what he has done." In *Butterfield* v. *Byron* it was said that under such circumstances "there is an implied assumpsit for what has properly been done by either of them, the law dealing with it as done at the request of the other, and creating a liability to pay for its value, to be determined by the price stipulated in the contract, or in some other way if the contract price cannot be made applicable." To the same effect is the decision in *Young* v. *Chicopee*, 186 Mass. 518. The fundamental principle was stated in *Hebert* v. *Dewey*, 191 Mass. 403, 411, in this language: "It is a general rule that if an implied condition that fails is of the essence of the contract, and enters largely into the consideration, in such a way that there can be no substantial performance under the conditions, the whole contract will fail, and the parties may have reasonable compensation for what they have done in reliance upon it." In the present case the supposed agreement to pay for the plaintiff's work and materials was of the essence of the contract, and its only consideration. This failed, and with it the whole contract fell to the ground, and the parties may have reasonable compensation for what they have done in reliance upon it. See *Hawkes* v. *Kehoe*, 193 Mass. 419, 423, 424. In *Eastern Expanded Metal Co.* v. *Webb Granite & Construction Co.* 195 Mass. 356, 362, 363, the principle was applied to a different state of facts, and the plaintiff was allowed to recover the price of labor and materials which had been furnished and used upon a contract which was void for illegality, and which was disaffirmed by the plaintiff for the illegality when it was entirely unexecuted in that part which the law forbade. The court said: "In this Commonwealth, when labor and materials are furnished and used upon real estate under a special contract, and for reasons which are not prejudicial to the plaintiff the contract becomes of no effect, it is held that the party furnishing them may recover upon a *quantum meruit* for their value as a benefit to the real estate." This case definitely decides that when labor and materials are furnished by a plaintiff under a special contract, and the contract is not binding upon either party, he may recover upon a *quantum meruit*. See

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also *Pullman's Palace Car Co.* v. *Central Transportation Co.* 171 U. S. 138, 150. *Spring Co.* v. *Knowlton*, 103 U. S. 79. *Logan County National Bank* v. *Townsend*, 139 U. S. 67. The general principle is the same as is always applied by the courts for the protection of parties who have acted under a mutual mistake of fact.

We think it plain that, under such circumstances as were shown in the present case, the law implies a contract on the part of the defendant to pay for that which the plaintiff furnished.

If the law implies an agreement to pay, how much is to be paid? There is but one answer. The fair value of that which was furnished. No other rule can be applied. Under certain conditions the price fixed by the contract might control in such cases. In this case there was no price fixed.

The defendant contends that because the erection of a Turkish bath house on Carver Street was not a profitable investment, and therefore, through a seeming error of judgment on the part of the defendant, the building did not add to the value of the land so much by a large sum as it cost, the plaintiff must suffer the consequences of the defendant's mistake and be precluded from recovery. It is suggested that *Gillis* v. *Cobe*, 177 Mass. 584, 590, allows recovery only in reference to the pecuniary benefit derived by the owner from the change in the character of his real estate produced by the contractor, so that if, through his own bad judgment, the increase in the value of the property from the construction of the building is, as in this case, $10,000 to $15,000 less than the cost of the building to the contractor, the loss must fall upon the contractor if he seeks to recover under the rule stated in *Hayward* v. *Leonard*, 7 Pick. 181. The decision in *Gillis* v. *Cobe* was by four justices of the court, while three others of the justices thought that a part of the statement of law in the opinion resulted from a misunderstanding of the meaning and effect of previous decisions of this court. If, in a suit founded on the law laid down in *Haywood* v. *Leonard*, the decision in *Gillis* v. *Cobe* can be construed as largely diminishing the amount which the contractor would otherwise be entitled to recover for the erection of a building like that in the present case, it is to be noticed that this is the only decision in this Commonwealth in which there has seemed to be any practical difference between the views stated in the opinions in the

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case, in their application to the facts before the court, and the only one in which the court has had occasion to consider the subject. The evidence did not present for consideration the effect of unwise management by the owner upon a contractor's right to recover. It is also to be noticed that nowhere, so far as we have been able to discover, does the law, as applied to such cases in other jurisdictions, make the right of the contractor depend in any degree upon the profit or loss to the owner, arising from his wisdom or folly, or good fortune or bad fortune, in erecting the building upon his land.

Whatever view may be taken of the law stated in that decision, it has no application to the case at bar. In cases of that class the work is done under an express contract which is binding upon both parties to the day of the trial. If the contractor has tried in good faith to perform his contract, and has performed it substantially, the courts hold that it would be unjust for the owner to stand upon the contract and refuse to pay anything because of the contractor's failure to perform it fully. It is therefore held that, on equitable grounds, he must pay under a rule which will give him all equitable rights secured by the contract, whether in regard to damages for non-performance or the rate of payment prescribed. If the plaintiff's work and materials had been furnished under a binding contract which had been substantially but not perfectly performed, we should be obliged to determine whether, under the law so often stated in Massachusetts, he could be precluded from recovery by reason of the mistake or misfortune of this defendant in the management of his property. No such question arises on the facts now before us. In this case there was no express contract. The plaintiff's right is to recover upon an implied contract of an owner to pay for labor and materials used upon his property at his request. Whatever may be the reason or the measure of the right of recovery in cases like *Haywood* v. *Leonard*, in cases of the class to which the present one belongs the right does not depend upon the ultimate benefit received by the owner.

In *Butterfield* v. *Byron*, *ubi supra*, the destruction of the defendant's property by lightning was what terminated the contract and gave the plaintiff his right to recover. In each of the cases of *Cleary* v. *Sohier*, *Angus* v. *Scully* and *Young* v. *Chicopee*,

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ubi supra, the same is true of the destruction of the owner's property by fire. In all cases to which this general principle has been applied, the recovery has been upon a *quantum meruit* for that which was furnished, subject to diminution of the amount by the price named in the contract, if that was very low. The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit to the property of the owner at whose request it was furnished.

It follows that the plaintiff is entitled to recover the fair value of his labor and materials.

Exceptions sustained.

MAY A. GOOCH *vs.* CITIZENS ELECTRIC STREET RAILWAY COMPANY.

Essex. March 9, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Agency. Street Railway. Employers' Liability Act.

A motorman in the general employ of a street railway company, who at his request is excused from duty during the morning of a certain day, an extra man being put in his place, with the arrangement that he shall run an extra car in the afternoon or find a substitute to do so, after he is thus excused and before he has found a substitute for the afternoon, is not an employee of the company within the meaning of the employers' liability act, and if he goes into a telephone booth in a waiting room at a station of the company, where he afterwards is found dead, the circumstance that, when killed, he may have been using or intending to use the telephone in completing arrangements to be relieved from duty in the afternoon, even if it is a fact instead of a pure conjecture, does not make him an employee of the company, because the making of an arrangement for a substitute or finding out whether an extra car was to be run that afternoon would be for himself and not in behalf of the company.

TORT by the widow of one Howard G. Gooch, late of Newburyport, under R. L. c. 106, § 73, to recover for the instantaneous death of her husband on July 26, 1907, alleged in the first count to have been caused by a defect in the ways, works or machinery of the defendant, and alleged in the second count to have been caused by the negligence of a person intrusted with and exercising superintendence. Writ dated September 7, 1907.

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At the trial in the Superior Court before *Bishop*, J., there was evidence from which the jury could find that the death of the plaintiff's husband was due to an electric shock received while he was in a telephone booth of the defendant, on the first floor of a building on Market Square in Newburyport, the lower floor of which was used as a waiting room, and the second for the offices of the defendant. There also was evidence from which the jury could find that the electric current to which the shock was due was caused by the sagging of a wire of the Newburyport Gas and Electric Company, which carried a high current, upon the telephone wire of the defendant, which was supported on poles beneath the wire of the Newburyport Gas and Electric Company. It further appeared that the telephone wires of the defendant had been strung on its own poles some eight years before the accident and that the wires of the Electric Company were strung on the poles of the New England Telephone and Telegraph Company some four years before the accident. Other facts appeared in evidence which are stated in the opinion. At the close of the evidence the defendant asked for certain rulings, of which the first, second and eighth were as follows:

"1. On all the evidence the plaintiff is not entitled to recover on the first count.

"2. On all the evidence the plaintiff is not entitled to recover on the second count."

"8. On all the evidence the intestate was not, at the time the accident occurred, an employee of the defendant within the meaning of the employers' liability act."

The judge refused to make these and other rulings requested by the defendant, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $5,000. The defendant alleged exceptions.

E. K. Arnold, for the defendant.

J. P. Sweeney & L. S. Cox, for the plaintiff, submitted a brief.

SHELDON, J. In this action, brought under the employers' liability act, R. L. c. 106, § 73, there can be no recovery unless the plaintiff's intestate, at the time of the injury which caused his death, was acting in the employ of the defendant. *Dane* v. *Cochrane Chemical Co.* 164 Mass. 453, 457. The first and most

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important question is, accordingly, whether at that time the relation of employer and employee existed between the defendant and the deceased.

He was in the general employ of the defendant as a regular motorman, paid, as the evidence indicates and as his counsel state in their brief, at a fixed rate per hour. His hours were from 10.45 A. M. to 12.45 P. M., and from 5.15 P. M. to a late hour of the night. On the morning of the day of the accident he went to the defendant's car barn, and applied to Mr. Butterfield, who was there in charge, to be relieved from work on that day, and after some talk it was arranged between them that one Bushee, a spare man or substitute, should run the forenoon trips of Gooch, the deceased, and that Gooch should either run an extra car in the afternoon or himself find a substitute to do so. Gooch thereupon left the car barn and rode on a car of the defendant to a waiting room at Market Square. On the way thither, in conversation with the conductor of that car, he stated that he was not working, but would have to run an extra car "if he could not find a fellow named Follansbee." Then Gooch went into the telephone booth in the defendant's waiting room at Market Square, and soon after was found there dead.

Upon these facts it is impossible to distinguish the case at bar from *Dickinson* v. *West End Street Railway*, 177 Mass. 365. In that case a motorman in the general employ of the defendant, going home to dinner after his morning's work, was injured while riding on the front platform of one of the defendant's cars. He was being carried free of fare, under a rule of the company allowing this privilege to its employees in uniform. His injury was due to negligence of the motorman who was operating the car; but it was held that he was not then in the employ of the defendant, and accordingly was not a fellow servant of the motorman of that car. Here, as in that case, the regular work assigned to Gooch consisted of a certain number of trips at fixed and regular times each day. Here, as there, he was not upon actual duty; his time was his own, until some time in the afternoon. His pay had stopped. He was discharged until a fixed hour in the afternoon. He rode on the defendant's car to Market Square, and went into the telephone booth at that station, not in the line of his duty in the course of his employ-

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ment but for his own purposes. See the cases cited in *Dickinson* v. *West End Street Railway*, *ubi supra*, on p. 368.

The circumstances here are very different from those of *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, or *Packet Co.* v. *McCue*, 17 Wall. 508. Gooch had left the defendant's premises and had become his own man. He was a passenger on the defendant's car, not a mere servant. For the same reasons, such cases as *Walbert* v. *Trexler*, 156 Penn. St. 112, and *Broderick* v. *Detroit Union Railroad & Depot Co.* 56 Mich. 261, do not help this plaintiff. This case resembles more nearly *Wink* v. *Weiler*, 41 Ill. App. 336. Nor was Gooch leaving the defendant's premises by the means of exit provided for that purpose. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575, 577.

Nor can the plaintiff be helped by the suggestion made in her behalf that Gooch was using or intending to use the telephone in completing arrangements that had been partially made with reference to his being relieved from duty in the afternoon, and so was really acting in the service of the defendant when he was killed. In the first place, this is mere conjecture. *McGee* v. *Boston Elevated Railway*, 187 Mass. 569. *Donaldson* v. *New York, New Haven, & Hartford Railroad*, 188 Mass. 484. *Lizotte* v. *New York Central & Hudson River Railroad*, 196 Mass. 519. In the next place, it was for Gooch himself, if he wished to have his leave of absence run through the afternoon, to make the arrangement with some substitute. So it was for him to ascertain, if he needed further information, whether the extra car was to be run that afternoon. All these arrangements, as the matter had been left, were his individual concern, rather than that of the company. There was nothing to show that Gooch was in any way acting in the service of the company in attempting to use the telephone, or to answer it if he heard a ringing from it.

It follows from what has been said that the jury were not warranted in finding that the plaintiff's intestate was in the employ of the defendant at the time of the accident which caused his death; and the defendant's first, second and eighth requests for instructions should have been given. The other questions raised in the case become immaterial and need not be considered.

Exceptions sustained.

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GEORGE WHEATLAND *vs.* CITY OF BOSTON.

Suffolk. March 9, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Tax. Limitations, Statute of. Words, "Tax."

The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, is not a mere statute of limitation but is a condition precedent to a right of action.

The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, applies to an action for the amount of a tax laid under an unconstitutional statute.

The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, applies to an action for the amount of a special assessment so paid, such an assessment being a "tax" within the meaning of the statute.

CONTRACT, by the owner of certain lots of land on Ivy Street and Mountfort Street in Boston, for $3,988.26 paid by the plaintiff under protest as assessments levied by the street commissioners on the plaintiff and other abutters for the construction of those streets under St. 1892, c. 418, § 8, which was held to be unconstitutional in *Lorden* v. *Coffey*, 178 Mass. 489, decided on April 4, 1901, the first of the payments having been made on June 21, 1899, and the last having been made on March 20, 1901. Writ dated November 16, 1901.

In the Superior Court the case was submitted to *Schofield*, J., upon an agreed statement of facts. He ordered that judgment be entered for the defendant, and at the request of both parties reported the case for determination by this court, such judgment to be entered as law and justice required.

R. Spring, for the plaintiff.

A. L. Spring, for the defendant.

SHELDON, J. The plaintiff's action was brought more than seven months after the last one of the payments made by him to the defendant on account of the assessments laid by the street commissioners for the construction of Ivy and Mountfort Streets. It is provided by R. L. c. 13, § 86, as follows: "No action to

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recover back a tax shall be maintained, except as provided in section seventy-three, unless it is commenced within three months after payment of the tax nor unless such tax is paid either after an arrest of the person paying it, a levy upon his goods, a notice of a sale of his land, a protest in writing signed by him, or a withholding of money due to him under the provisions of section eighty-one." The defendant contends that by reason of this statutory inhibition the action cannot be maintained.

It is to be observed that this is not a mere statute of limitations. It establishes certain conditions precedent to the maintaining of an action to recover back a tax. One of these is in substance that the payment must have been made under protest or under certain modes of compulsion mentioned in the statute; the other is that the action shall have been brought within the time specified. Compliance with the latter of these conditions is no less essential to the right of action than compliance with the former. In this respect the statute is like that considered in *McRae* v. *New York, New Haven, & Hartford Railroad*, 199 Mass. 418. And this consideration is fatal to the plaintiff's case, unless we can adopt his contention that the statute does not apply to the prosecution of his claim. He rests this contention upon two grounds: First, that the provisions of the statute are not applicable to any tax or assessment which was laid under an unconstitutional statute, and which must be regarded as merely void; and secondly, that special assessments, such as are here in question, are not taxes within the meaning of that word as used in this statute.

1. The plaintiff's first contention is that the statute imposes conditions upon the bringing of actions in which it is sought to recover back taxes which are invalid by reason of some irregularity in the assessment, or because the person from whom the collection was made was not bound to pay the tax by reason of non-residence, or because some one of the purposes for which the tax was levied was improper, or by reason of some other similar irregularity. But he contends that a tax levied under an unconstitutional statute, being merely void, is no tax at all, and accordingly does not come within the words of a statute which provides for the collection of taxes and regulates the

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right to recover back taxes which have been collected without right. But exactly the contrary of this contention was held in principle in *Barrett* v. *Cambridge*, 10 Allen, 48. The plaintiff in that case sought to recover back the amount of an assessment laid upon him for the grading of a street under a statute which was afterwards adjudged to be unconstitutional. He had paid the assessment upon demand to avoid proceedings against his property, although no process had then issued. It was held that he could not maintain his action because his payment must be deemed to have been voluntary under the laws regulating the collection of taxes. This was accordingly in reality an adjudication that the laws regulating the recovery back of a tax were applicable to an action for the recovery of a special assessment like that which is now before us levied under an unconstitutional statute. The same principle was applied in *Knowles* v. *Boston*, 129 Mass. 551. The assessment in that case was not indeed laid under an unconstitutional statute, but it was imposed by a board which had no jurisdiction to act in the matter and was as truly void as if it had been laid without any authority of law or under an unconstitutional act. But relief was refused to the plaintiff because he had not complied with the requirements of the statute then in force (Gen. Sts. c. 12, § 56), regulating the right to sue for the recovery back of taxes. It is especially illegal, invalid or void taxes which may be recovered back from a city or town in an action of contract. *Dorr* v. *Boston*, 6 Gray, 131. *Goodrich* v. *Lunenburg*, 9 Gray, 38. *Gerry* v. *Stoneham*, 1 Allen, 319. *Loud* v. *Charlestown*, 99 Mass. 208. *Smith* v. *Boston*, 194 Mass. 31. And it would seem to follow that a statute like this must prevent, after the lapse of the specified time, an action to recover back a tax which is void because laid under an unconstitutional statute as much as a tax which is void or can be avoided for any other reason.

Nor do we find anything in *Dexter* v. *Boston*, 176 Mass. 247, *White* v. *Gove*, 183 Mass. 333, or *Smith* v. *Boston*, 194 Mass. 31, to sustain this contention of the plaintiff. In *Dexter* v. *Boston* and *Smith* v. *Boston* no contention was made that the actions were not seasonably brought. The statements in these two cases that the assessments were absolutely void because they

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were made under an unconstitutional statute and stood as if there had been no statute, showed the reason for giving a right of action; but it appeared or was assumed in each case that the statutory preliminaries to the enforcement of this right of action had been fully complied with, and the court made no intimation that the plaintiffs in those cases were not bound to comply with all the requirements of the statute. And we do not doubt that if this plaintiff had followed the course taken in *White* v. *Gove*, *ubi supra*, and allowed his lands to be sold for the payment of the assessments, he might have avoided the title of a purchaser at such sale. He preferred, however, to pay the assessments and sue to recover them back. Just as, if he had chosen to allow his lands to be sold for the assessments, he would have lost them if he had failed to bring suit for their recovery within the prescribed period of limitations and in the manner required by law, so his right to maintain this action must depend upon his compliance with the conditions imposed by the statute upon that remedy.

2. But the plaintiff further contends that these assessments were not taxes within the meaning of R. L. c. 13, § 86; that this statute applies simply to actions for the recovery back of ordinary municipal taxes imposed for the general purpose of raising a revenue for the general public necessities, and does not include special assessments for merely local improvements such as are here in question. He has referred us to many decisions made under the constitutions or laws of other States, in which the limited meaning for which he contends has been applied to the words "tax," "taxes" or "taxation," when used in certain connections in those constitutions and statutes. See for example *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190; *Galveston* v. *Guaranty Trust Co.* 107 Fed. Rep. 325; *Sharp* v. *Speir*, 4 Hill, 76; *Herrman* v. *Guttenberg*, 33 Vroom, 605; *Pray* v. *The Northern Liberties*, 31 Penn. St. 69; *Mayor & City Council of Baltimore* v. *Green Mount Cemetery*, 7 Md. 517; *Thompson* v. *Detroit*, 114 Mich. 502; *Lamar Water & Electric Light Co.* v. *Lamar*, 128 Mo. 188; *Mayor & Aldermen of Birmingham* v. *Klein*, 89 Ala. 461; *Charnock* v. *Fordoche Levee Dist. Co.* 38 La. Ann. 323; *Sanders* v. *Brown*, 65 Ark. 498; *Hines* v. *Leavenworth*, 8 Kans. 186; *Chambers* v. *Satterlee*, 40 Cal. 497; *Smith* v. *Farrelly*, 52 Cal. 77; *Denver* v. *Knowles*, 17 Col. 204;

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Higgins v. *Bordages*, 88 Texas, 458; *Allen* v. *Galveston*, 51 Texas, 302. And it is true that although the power to lay assessments of this kind is an exercise of the taxing power and such an assessment is included in the word "tax" used in a broad sense, yet they ordinarily are not spoken of as taxes. *Bridgeport* v. *New York, New Haven, & Hartford Railroad*, 36 Conn. 255. *State* v. *Newark*, 3 Dutch. 185, 190. *Pettibone* v. *Smith*, 150 Penn. St. 118. *Washington Avenue*, 69 Penn. St. 352, 359, 360. *Adler* v. *Whitbeck*, 44 Ohio St. 539. *City Council of Augusta* v. *Murphy*, 79 Ga. 101. *Peoria* v. *Kidder*, 26 Ill. 351. *Chicago* v. *Larned*, 34 Ill. 203. *Weeks* v. *Milwaukee*, 10 Wis. 242. *Peay* v. *Little Rock*, 32 Ark. 31.

But the question is as to the meaning of the word "tax" in our own statute, and we cannot gain much assistance from the decisions above referred to. This section is found in a chapter which deals with the collection of ordinary city and town taxes; and this circumstance is relied on by the plaintiff. But it is also provided in R. L. c. 50, § 10, that these assessments "shall constitute a lien upon the land assessed and shall be enforced in the manner provided for the collection of taxes." And see St. 1902, c. 521, § 1. This would seem to make the general rules prescribed in R. L. c. 13, applicable to the collection of these assessments. And § 86 of the latter chapter manifestly deals with the final collection of taxes, and *prima facie*, therefore, must be taken to have been intended to cover the recovery back of assessments as well as of ordinary taxes. And this court has so dealt with the matter, by applying the same rules to actions for the recovery back of both species of taxes. *Barrett* v. *Cambridge*, 10 Allen, 48, and *Knowles* v. *Boston*, 129 Mass. 551, already referred to. And in other decisions of this court the collection of these assessments and their recovery back have been treated as coming under the same rules as in the case of other taxes. Such assessments were called a mode of taxation and sustained as such in *Dorgan* v. *Boston*, 12 Allen, 223, 234. See also *Wright* v. *Boston*, 9 Cush. 233; *Prince* v. *Boston*, 111 Mass. 226, 231; *Bigelow* v. *Boston*, 123 Mass. 50, 52. Exemption from liability to such assessments has been discussed and decided upon the same principles that regulate exemption from ordinary taxation, either upon direct statutory provisions

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or upon the general principles which are applicable alike to every mode of taxation. *Harvard College* v. *Aldermen of Boston*, 104 Mass. 470. *Boston* v. *Boston & Albany Railroad*, 170 Mass. 95, 98, and cases cited.

We are of opinion that it was the intention of the Legislature to include taxes or assessments of this kind under the general language of R. L. c. 13, § 86; and it follows that on the agreed facts judgment must be entered for the defendant.

So ordered.

MARY A. BOWEN *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Suffolk. March 11, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Assignment. Bailment. Damages. Negligence.

In order that the assignee of a chose in action may maintain an action thereon in his own name under R. L. c. 173, § 4, the assignment must have been executed and delivered before the date of the writ.

The bailee of a chattel which is destroyed by the negligence of another may maintain an action for the loss of his special property in it, and, with the consent of the general owner, he may recover the full value of the chattel.

In an action against a railroad corporation by the proprietor of a truck, in which a heavy chattel was brought to the freight yard of the defendant to be delivered to servants of the defendant for transportation, for injury to the chattel through the negligence of the defendant's servants when lifting it from the plaintiff's truck by means of a derrick, if there is evidence that the driver of the truck, who was the servant of the plaintiff, assisted in making the hitch of the chain that fastened the chattel to the derrick, the defendant is entitled to have the jury instructed that the plaintiff cannot recover from the defendant if he or his agents or servants contributed to the injury.

TORT, brought by Mary A. Bowen, who was engaged in the teaming and trucking business, as the assignee in writing of James H. Roberts and Daniel G. Langlands, the manufacturers and owners of a fly wheel delivered at the defendant's freight yard at East Cambridge for transportation over its railroad and alleged to have been injured and destroyed through the negligence of the defendant's servants when lifting it from the plain-

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tiff's wagon by means of a crane or derrick. Writ dated July 16, 1907.

The declaration originally was as follows:

"First count: And the plaintiff says that she is the assignee of James H. Roberts and Daniel G. Langlands, both of Boston, in said county.

"And the plaintiff says that the defendant is a common carrier for hire of passengers and freight, and received for carriage from the plaintiff's assignors at Boston, in said county, one large fly-wheel in two parts, the property of the plaintiff's assignors, on or about the fourteenth day of June, in the year 1907. And the defendant, in consideration of a certain freight to be paid by the plaintiff's assignors, agreed and undertook to carry said fly wheel from said Boston to Stafford Springs, in the State of Connecticut, and there to deliver the same, but that said defendant failed so to deliver the same, and the said fly wheel is wholly lost and destroyed."

"Second count. And the plaintiff says that she is the assignee of James H. Roberts and Daniel G. Langlands, both of Boston, in said county.

"And the plaintiff says that the defendant operates a steam railroad in said Boston, and is a common carrier for hire of passengers and freight over and upon said railroad, and that the defendant received from the plaintiff's assignors, on or about the fourteenth day of June, in the year 1907, a certain large fly wheel, the property of the plaintiff's assignors, to be safely carried by it, that the defendant, its agents and servants, did not safely carry said fly wheel, but so negligently, carelessly and improperly received and handled, and managed said fly wheel that they wholly destroyed it."

A third count, added later by amendment one day before the date of the return of the verdict, was as follows:

"And the plaintiff says that she is the assignee of James H. Roberts and Daniel G. Langlands, both of Boston in said county.

"And the plaintiff says that the defendant operates a steam railroad in said Boston, and is a common carrier for hire of passengers and freight over and upon said railroad, and that on or about the fourteenth day of June, 1907, the plaintiff's assignors

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tendered unconditionally a certain large fly wheel to the defendant for transportation over its railroad; that the defendant, by its agents and servants, carelessly, negligently and improperly handled and managed the said fly wheel and that they wholly destroyed it."

A still later amendment, filed by consent two days before the date of the allowance of the bill of exceptions, was as follows:

"And now comes the plaintiff in the above entitled cause and moves to amend her declaration by striking out the words 'And the plaintiff says that she is the assignee of James H. Roberts and Daniel G. Langlands, both of Boston in said county.'"

In the Superior Court the case was tried before *Pierce*, J.

One Grady, a witness called by the plaintiff, testified on direct examination that in June, 1907, he was employed by the plaintiff and took a fly wheel weighing about two tons from J. H. Roberts and Company, East Cambridge, to the Boston and Albany yards in Boston; that he drove under a crane and then went over to the platform and told one Wood, the man in charge, that he had a fly wheel; that Wood said he would send some men over to take it off; that there were three men at the derrick when he drove up; that he had seen these men before at the platform but not at the crane. The fly wheel was in two parts, resting on the flanges with the hub up. He then testified as follows:

"Q. What did these men do with the fly wheel which was on your team?

"A. Well, I got the ropes off the wheel to make it ready for them, and I supposed they were going to take one wheel off, one half, and one of the men there said, 'We will take the two of them off.' It was getting late, it was then between half past four and five o'clock; so I supposed they knew their business and — So they put the chain around the two of them and got down on the winch and started to wind it up, and when they got the strain on it got about a little way out of the wagon and I heard a break and I told them to stop, so they stopped, and Mr. Wood came over between some cars; I told him what had happened, and he passed some remark, I couldn't say just what it was, that they couldn't receive it; so I told him not to touch the wheel until I reported to my boss. So I went up and tele-

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phoned to my boss, Mr. Bowen,* and he come down and looked at it to see how the thing was, and told me to leave the wagon there and take the horses off and take them away."

He further testified that the wheel was in good condition, that a chain was used to lift the wheel and was wrapped around the hub; that there was no block between the hubs, but they were lying right close together; that he had nothing to do with making the chain fast to the fly wheel, did not give any instructions to anybody, and did not have anything to do with lifting it.

On cross-examination he testified that he had never unloaded machinery from a crane before, but that he knew how to unload a fly wheel such as he had; that he could not have unloaded it alone as it was too heavy for one man to handle; that Wood was one and one half times the length of the court room away from the crane on the platform; that he told Wood that he had a fly wheel, as he expected Wood to send over some men to help him and wanted him to do so; that he was on and off the team while the hitch was being made; that some one might have handed him the end of the chain while the hitch was being made; that he did not know which man actually made the hitch; that he did not know all of the men on the team. In a written statement admitted to be signed and certified to by him, introduced in evidence by the defendant as an exhibit for the purpose of contradicting the witness, he said:

"I drove right up under the crane and found three of the railroad hands there. I said that we had better take one half of the wheel at a time. This was the first thing said by any one. I supposed of course that it was part of their duty to help me. They said that it would be all right to take both pieces together and make one job of it, that it was getting late. I got down on the ground and began unroping the wheel from the wagon, while the three railroad hands put the chain around the wheel and made the hitch. When I got the ropes off from below I got up on the team and helped hold the two parts of the wheel together while one of the men finished putting the chain around them. I wanted to help out as much as possible in making the hitch. When the hitch was all made the railroad hands went over to the derrick and began turning the cranks. We wanted to raise it a

* The plaintiff's son, who carried on the teaming business for her.

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little from the wagon to see if the hitch was O. K. As soon as the strain came three of the spokes broke. The wheel was not raised a single inch from the wagon. The men stopped turning as soon as the spokes snapped. I gave no orders about making the hitch or running the derrick, but trusted to the railroad men; for I thought that they knew more about such things than I."

On re-direct examination he testified that he remembered passing the end of the chain to one of the men on request; that when a teamster came into the Boston and Albany yard with a heavy object "they had men there to unload, he helped, of course."

On re-cross examination he testified that he understood that he was there to help and intended to help so far as he could in unloading.

One Langlands, a witness called by the plaintiff, testified that he was the sole surviving member of the firm of James H. Roberts and Company, that in June, 1907, he employed Bowen to cart a fly wheel from his factory in Cambridge to the Boston and Albany yards; that when he found the wheel was broken he told Bowen that Bowen must either give him a clean receipt from the railroad for this wheel or pay him for it; that Bowen paid him for the wheel in full and he gave Bowen a receipted bill for the wheel; that he executed the assignment. The receipted bill and the assignment were put in evidence. The bill was dated July 26, 1907, and was for "one split fly sold to C. Bowen for $325, with a freight charge of $12.50." The assignment was dated August 3, 1907. This was the only assignment introduced in evidence.

Langlands further testified that if a wheel is in two parts and the hubs are short and do not come together and there is no blocking between, a wrap hitch would pull the centre out, which would result in the breaking of the spokes; to lift the two parts together it would be necessary to put a block between the hubs unless separate hitches were made; that this fly wheel weighed from three to five tons.

On cross-examination he testified that he sent a bill to Bowen, who protested against paying it at first, but he told Bowen he would hold Bowen liable, as he knew nobody else, and then Bowen paid in full, getting a receipt in full; that he intended to

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release Bowen from all further liability; that a check dated August 9, 1907, was given by Bowen in payment; that the assignment in evidence was signed by him a few days before the trial but merely carried out his previous intention.

On re-direct examination he testified that he agreed to put Bowen into his place against the Boston and Albany Railroad.

There was other evidence both for the plaintiff and the defendant.

At the close of the evidence, the defendant asked the judge to rule that there was not sufficient evidence to warrant a finding for the plaintiff, and asked him to instruct the jury that the plaintiff was not entitled to recover. He also asked for other instructions of which the fifteenth was as follows: "15. The plaintiff cannot recover from the defendant if she or her agents or servants contributed to the injury."

The judge refused to order a verdict for the defendant, or to give any of the instructions requested. He submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $364.50. The defendant alleged exceptions.

G. H. Fernald, Jr., for the defendant.

W. Flaherty, for the plaintiff.

SHELDON, J. The plaintiff's declaration as originally drawn set forth a cause of action which had become vested in her assignors, Roberts and Langlands; and this is true also of her third count, which apparently was filed at the trial. Her right to maintain the action in her own name accordingly depends upon the provisions of R. L. c. 173, § 4: "The assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defenses and rights of counterclaim, recoupment or set-off to which the defendant would have been entitled had the action been brought in the name of the assignor." But the bill of parcels which she received from her assignors and the assignment of the cause of action which she took from them bear dates subsequent to July 16, 1907, which was the date of her writ; there was no evidence that either instrument was delivered before that time; and there was direct evidence put in by the plaintiff that the assignment had been executed only a few days before the trial. Accordingly the plaintiff, when she brought

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her writ, was not the assignee of this chose in action, nor had it been assigned in writing. It follows that she cannot maintain the action as such assignee. Indeed, this was conceded by the plaintiff's counsel at the argument in this court.

But the plaintiff had as bailee a special property in the fly wheel which is the subject of the action, and so might sue in her own name for the injury to it, and, at any rate, with the consent of the general owner, could recover full damages therefor. *Brewster* v. *Warner*, 136 Mass. 57. But it is difficult to see in her declaration, even with the amendment made after the trial and shortly before the allowance of the exceptions, a statement of any such cause of action. The averment is only of a wrong done to her assignors by an injury to their property. But passing over this objection, which does not appear to have been specifically taken at the trial, it is manifest that if she sued in her own right, it would be a defense if the negligence of herself or her agents or servants contributed to the injury. The jury might have found that there had been such negligence in Grady, her driver; and the defendant's fifteenth request should have been given in substance. In any event, therefore, there must be a new trial.

As the case seems to have been tried upon the theory that the plaintiff could recover as assignee for the damage done to the property of her assignors, and as apparently only that question was called to the attention of the judge at the trial, it is not likely that the other questions presented will be raised again in the same way; and they need not be considered.

Exceptions sustained.

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THEODORE R. CONVERSE, receiver, *vs.* GEORGE NICHOLS, 2d, & others.

Essex. March 12, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Limitations, Statute of. Executor and Administrator. Corporation, Foreign, Liability of stockholder. *Receiver.*

Where, after an assessment lawfully has been made upon a Massachusetts stockholder in a foreign corporation, he dies and, after an administrator of his estate has been appointed and has qualified by giving bond, the two year period of limitation provided for in R. L. c. 141, § 9, passes, no action for the collection of the assessment can be maintained against the heirs and next of kin of the stockholder under R. L. c. 141, §§ 26 28, which provide for the enforcement of rights of action which accrue after the expiration of the two year period of limitation, since the right accrued not only before the expiration of such period, but also before the death of the decedent.

A citizen of Massachusetts owned stock in a certain corporation organized in a State whose constitution contained a provision that a stockholder in a domestic corporation of that nature should be liable for the debts of the corporation to the amount of the stock owned by him. The statutes of the State provided for the adjudication by a proper court of the inability of such a corporation to pay its debts, for the determination of the amounts of the debts, for successive assessments upon the stockholders and for the appointment of a receiver with power to collect such assessments by proper proceedings in other States. Such proceedings duly were taken in the State of its incorporation with regard to the corporation in question and an assessment was made upon the stockholders. Thereafter the Massachusetts stockholder died, an administrator of his estate was appointed, the two year period of limitation provided for in R. L. c. 141, § 9, passed and the estate was fully administered. Subsequently a second assessment duly was made in the court of the State where the receivership proceedings were pending, and the receiver by a bill in equity sought under R. L. c. 141, §§ 26–28, to enforce payment of such assessment by the heirs and next of kin of the deceased stockholder, contending that the right of action was, as was required by § 27, one which accrued after the expiration of the period of limitation provided by R. L. c. 141, § 9, and which could not legally have been presented to the Probate Court. *Held*, that the bill must be dismissed, since, before the estate of the deceased stockholder had been fully administered, because of the continued pendency of the receivership proceedings, the claim of the plaintiff, although uncertain in amount, had become one which "may become justly due from the estate," and which therefore under R. L. c. 141, § 13, might have been presented to the Probate Court and provision made for the reservation of funds or the giving of security for its payment.

The object of the proceedings before the Probate Court under R. L. c. 141, §§ 13, 14, which provide for the retention of funds by an executor or administrator on presentation by a creditor of the estate, before the estate is fully administered, of a claim the right of action to enforce which does not accrue within two years after

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the giving of the administration bond, is not to collect the claim presented nor even finally to adjudicate its amount or validity, but simply to extend the period of time after which by R. L. c. 141, § 9, it otherwise would be barred.

A receiver of a foreign corporation, lawfully appointed by a court of the State of its incorporation with power "to sue for . . . compromise and settle any and all stockholders' liability that may exist under the constitution and laws of" such State "or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by" the court which appointed him "on account thereof for the satisfaction of the claims of the creditors" of the corporation, since he is entitled to prosecute a claim for the enforcement of an assessment against a stockholder when it becomes due, is the proper person to present to the Probate Court, in which the estate of a Massachusetts stockholder of the corporation is being administered, a petition under R. L. c. 141, § 13, seeking to have funds of the estate reserved or security given for the payment of an assessment which may be made and become due after the expiration of the two year period of limitation provided for by R. L. c. 141, § 9.

HAMMOND, J. This is a bill in equity brought* by the receiver of a Minnesota corporation under the provisions of R. L. c. 141, §§ 26–28, inclusive, against the heirs at law of John B. Nichols, late of Haverhill, in the county of Essex, deceased, and the legatees under the will of his widow, to enforce his personal liability as a stockholder of that corporation for its indebtedness. The case was heard in the Superior Court upon the question of a final decree upon the bill, answer, replication and an agreed statement of the evidence, and the law of Minnesota, as shown by printed copies of the statutes and the printed reports of its Supreme Court. No question of pleading was raised. The judge reserved and reported the evidence and all questions of law for the consideration of this court, "such decree to be entered thereon as equity may require."

Two assessments were made, the first on December 22, 1902, and the second on June 11, 1907. Inasmuch as the first was made before the death of John B. Nichols, the stockholder, it is barred by the statute of limitations, and no action to recover the amount thereof can be maintained against either the administrator or the heirs. R. L. c. 141, §§ 9, 27.

The second assessment, however, was made after the death of Nichols, (which occurred on March 1, 1903,) and after April 26, 1905, when his estate had been fully administered; and the main question is with reference to this assessment.

* The bill was filed in the Superior Court for the county of Essex on August 15, 1907.

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"By the policy and provisions of our laws, the remedy of a creditor upon the heirs and devisees of a deceased person, is extremely limited. Every demand which can be made and enforced against the estate of a deceased person, is to be pursued against the administrator where it can be done, and the whole estate, personal and real, is in effect made assets in his hands to meet such claims." Shaw, C. J., in *Hall* v. *Bumstead*, 20 Pick. 2, 6. The remedy is that provided by the statute and none other.

The statute upon which the plaintiff relies is R. L. c. 141, §§ 26–28. These sections in substance provide that under certain conditions therein fully set forth a creditor of the estate of the deceased may recover his claim against the heirs or legatees, but this right to recover does not extend to a claim which comes within the provisions of § 13 of the same chapter. This last named section, so far as material, runs as follows: "A creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, upon examination thereof, the court finds that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient assets to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of his claim if it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid."

In discussing the scope of this section we assume, without deciding, in favor of the plaintiff, that his right of action did not accrue within two years after the giving of the administration bond (an assumption without which the plaintiff cannot get on at all); and the question is whether on that assumption it appears that his claim could legally have been presented to the Probate Court under this section. If it could, then this action cannot be maintained. §§ 26, 27. *Pratt* v. *Lamson*, 128 Mass. 528, and cases cited.

The history of the legislation leading up to this section is reviewed to some extent in *Bassett* v. *Drew*, 176 Mass. 141, and

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need not be repeated here. As originally framed it applied only to cases where at the time of the presentation of the petition to the Probate Court the claim, though not payable, was justly due; and such was its form for many years. Rev. Sts. c. 66, § 5. Gen. Sts. c. 97, § 8. And consequently it was held in *Ames* v. *Ames*, 128 Mass. 277, that if the existence of the claim depended upon a future contingency it was not a debt within the statute. In that case Morton, J., in giving the opinion of the court (p. 278), said: "To bring himself within this provision, a person must show that he is a creditor of the deceased, . . . and that he has, at the time of his petition, a claim which is 'justly due from the estate.' It is not enough to show that the deceased has entered into a contract with him under which a liability may or may not arise in the future." And again (p. 279): "The provisions of . . . [the statute] . . . are confined to cases of creditors who have debts due from the estate, either payable presently or in the future. They do not extend to cases where the deceased has entered into a contract which may possibly result in a debt at some future time, but upon which there is no existing debt at the time of the application to the judge of probate. . . . Nothing has become due under this contract. It is entirely uncertain whether or not anything will ever become due. The existence of any demand or debt depends upon a contingency."

But by St. 1879, c. 71, the statute, as it then stood (Gen. Sts. c. 97, § 8), was amended by inserting the words "or may become," so that it read substantially as it now stands in R. L. c. 141, § 13. It is easy to see that this amendment has made a radical change in the statutes, but it is not so easy to see how radical the change is, or by a formula to prescribe in advance the exact limits of the change.

In *Bullard* v. *Moor*, 158 Mass. 418, it was said by Holmes, J., that the statute must be construed reasonably, and that it could not have been intended to enable any one who has an outstanding contract made by a deceased person to suspend the settlement of the estate indefinitely without regard to the probability of anything ever becoming due upon the contract; and it was held accordingly that, where the holder of a contract of indemnity had no notice of any valid claim, against which he was to be

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indemnified, until after the estate of the indemnitor had been fully administered, he was not obliged to apply to the Probate Court for a retention of assets, but could proceed immediately against the heirs.

In *Peabody* v. *Allen*, 194 Mass. 345, this particular feature of the statute was carefully considered. In that case it appeared that the plaintiff and the defendant had bought certain real estate under an agreement to share equally the profits and losses. The purchase money was all advanced by the petitioner. The estate was sold at a loss. Between the purchase and sale it had been injured by a change of grade made under the right of eminent domain for which the parties were entitled to compensation, a suit for which was still pending. Although it was uncertain whether after the recovery of this compensation there would be anything due from the respondent to the petitioner, yet it was held that the claim was within the statute. It was a claim which might become justly due, the court saying that "it seems reasonable to hold that the statute included a claim like that of this petitioner where all the elements of liability were fixed except the amount finally to be credited upon the loss." And it was so held notwitstanding the cause of action did not arise until the settlement of the suit for damages caused by the act of eminent domain.

The liability of Nichols, the stockholder, is based upon the provision of the Constitution of Minnesota. It is contractual. As was said by Braley, J., in *Converse* v. *Ayer*, 197 Mass. 443, 453 (a case concerning the first assessment in this very case), in which the whole subject was elaborately discussed: "The obligation [under the Constitution], even if created by operation of law, nevertheless was essentially contractual in character, and, if the corporate assets were insufficient to satisfy the debts of creditors, the defendant, while he remained a stockholder, voluntarily had entered into an implied contract to assume the deficiency to the amount of the par value of his holding."

Long before the death of Nichols, the stockholder, proceedings had been instituted in the State of Minnesota in accordance with the laws of that State, for the enforcement of this liability. It appears from the record that from and after May 25, 1901, the date of a foreclosure sale under a mortgage, the corporation was

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"wholly without assets or property of any sort or nature," out of which the claim of the creditors of the corporation or any part of such claims could "be paid, collected or realized." Upon proper proceedings had, the plaintiff was appointed receiver on August 16, 1901. The indebtedness of the corporation was more than $400,000, and this had been judicially ascertained as early as December 22, 1902, and the first assessment was made upon the stockholders. And all this took place during the lifetime of Nichols. In a word, Nichols, as one of the shareholders, was held liable to pay this large indebtedness to the extent of $27,000, the par value of his stock, and the court was proceeding to enforce that liability. It had made one assessment, but by the express provision of the statute its power was not exhausted by the first assessment. The statute provides that "in any case where the court shall have levied an assessment against stockholders . . . for a less amount or proportion than the full amount of the liability upon or on account of the stock . . ., and it shall hereafter be made to appear to the satisfaction of said court, by petition or otherwise, . . . that by reason of the insolvency of stockholders, or for any other cause, it is necessary or desirable or for the interest of creditors," then "another and further assessment" may be made, and "in the same manner," still "further and additional assessments" may be made, "not exceeding in the aggregate the maximum amount of liability." Gen. Laws of Minn. 1899, c. 272, § 7.

Before the estate of the deceased stockholder had been fully administered, the corporation had failed to pay its debts and had entirely exhausted its resources; a receiver had been appointed to wind up the concern, the amount of the debts for which the stockholders were liable had been judicially determined, and they greatly exceeded the par value of the stock held by Nichols. Whether the whole amount of the par value would be required was not known, it is true, but the amount required depended not upon any contingency except as to the amount which would be recovered from the other stockholders, or in other words, how much should be deducted from the full extent of his liability. It was not a case where it was doubtful whether the constitutional obligation ever would be called into active play. It had been called into play. The judicial machinery was

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at work and the work was to continue until whatever was needed from a stockholder to meet the debts was paid by him. The second assessment was to discharge the same liability as that for which the first was laid, and was upon the same contract and to pay the same debts. The case cannot be distinguished in principle from *Peabody* v. *Allen*, 194 Mass. 345.

If it be said that it could not be ascertained by the Probate Court how much finally would be due, the answer is that the court has not to determine finally that question. The object of the proceedings before the Probate Court under this statute is not to collect the claim presented, for it is not yet payable, nor even finally to adjudicate its amount or validity (R. L. c. 141, § 14), but simply to extend the time within which otherwise by the special statute of limitations it would be barred. Nor is it necessary that there should be sufficient personal property as assets in the hands of the administrator. An order under this statute to hold assets, even if there be no personal assets in his hands, is not without effect. On the contrary the legal effect is to hold him answerable for the claim beyond the special limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim as it shall be finally established in a subsequent suit, brought within one year after the claim becomes payable. *Bassett* v. *Drew*, 176 Mass. 141, and cases cited. R. L. c. 141, § 14. We are of opinion that before the estate of Nichols, the deceased stockholder, had been fully administered the plaintiff's claim had become a claim which "may become justly due from the estate" within the meaning of that phrase as used in R. L. c. 141, § 13.

It is objected however by the plaintiff that the receiver was not authorized to present any such claim to the Probate Court in this State. But it sufficiently appears from the decree appointing him receiver that he was empowered "to sue for, . . . compromise, and settle any and all stockholders' liability that may exist under the Constitution and laws of the State of Minnesota or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by this court on account thereof for the satisfaction of the claims of the creditors" of the corporation, including fees and costs either in the State of Minnesota or the courts of any other State or Territory.

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Since he was entitled to prosecute the claim when due, he was the proper person to present the petition to the Probate Court. See *Hammond* v. *Granger*, 128 Mass. 272, 277.

Bill dismissed with costs.

B. G. Davis, (*C. C. Colby* with him,) for the plaintiff.

B. B. Jones, (*J. J. Ryan* with him,) for the defendants.

DAVID M. LITTLE & others, trustees, *vs.* OLD COLONY RAILROAD COMPANY & others.

Suffolk. March 16, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Boston and Providence Railroad Corporation. Old Colony Railroad Company. New York, New Haven, and Hartford Railroad Company. Corporation, Officers and agents.

In 1888 the Boston and Providence Railroad Corporation leased all of its property to the Old Colony Railroad Company for ninety-nine years, the lease containing provisions that the lessee was to make all "permanent improvements on said railroads and property at its own expense" and at the end of the term of the lease was to return the demised property to the lessor with all permanent improvements thereon, and that the lessee might request from the lessor a conveyance to persons designated by the lessee of real estate owned by the lessor which was outside of its location and not required by the lessee for railroad purposes, and that the money received for such conveyances should be received by the lessee and be applied by it to additions to the railroad other than improvements, which should "thereupon become the property of the lessor, and subject to the provisions" of the lease. In 1893 the Old Colony Railroad Company made a lease for ninety-nine years of all its property, including its rights under the above lease, to the New York, New Haven, and Hartford Railroad Company, which succeeded to the rights and became subject to the obligations of the Old Colony Railroad Company under the first mentioned lease. By St. 1896, c. 516, §§ 9–20, the Boston and Providence Railroad Corporation was ordered to discontinue the use of certain of its land in Boston for railroad purposes, to build a new station on Dartmouth Street and to extend its road to the South Terminal station. By a deed in which all three of the foregoing railroad companies joined, the Boston and Providence Railroad Corporation sold and conveyed to the New York, New Haven, and Hartford Railroad Company "for one dollar and other valuable considerations" all of the land which the Legislature had ordered it to discontinue using for railroad purposes, and the New York, New Haven, and Hartford Railroad Company agreed that it would assume the burden of all suits against the Boston and Providence Railroad Corporation growing out of the extension of its railroad to the South Terminal station and

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would defend or settle or pay the judgments in all such suits without cost to the Boston and Providence Railroad Corporation. The deed was executed by the president of the Boston and Providence Railroad Corporation acting under authority conferred upon him by the board of directors. *Held*, that the condition imposed by St. 1896, c. 516, §§ 9–20, was a new condition not contemplated by the parties to the leases, that the conveyance appeared to be made for an adequate consideration, and that it was within the powers of the directors of the grantor corporation.

BILL IN EQUITY filed in the Supreme Judicial Court for the county of Suffolk on June 4, 1908. The allegations and prayers of the bill are summarized in the opinion. The eighth and ninth clauses of the lease from the Boston and Providence Railroad Corporation to the Old Colony Railroad Corporation were as follows:

"Eighth. The lessee will, during the continuance of this lease, protect and save harmless the lessor and the Rhode Island Company* against all actions or claims for injury to persons or property during the term thereof, by reason of any want of repair of the demised road and property or appurtenances, or of the road, property and appurtenances of the Rhode Island Company, or any want of care and skill in the operation and management of the same, or by reason of any defects therein; and will not permit the lessor or the Rhode Island Company to be subjected to any payment, penalty or forfeiture for violation of law in any respect in relation to the maintenance and operation of their said roads and property; but will indemnify and save them harmless against all loss, cost, damage or liability caused by it, or arising out of the use and operation of said roads and property, whether by reason of any contract, statute, negligence or misfeasance, or by reason of the neglect of the lessee or lessor to use and operate said railroad and property as required by law during the continuance of this lease. The lessee will make all permanent improvements on said railroads and property at its own expense; will keep the demised premises reasonably insured, and apply the proceeds of any insurance to restoring and replacing the property destroyed, or otherwise to the benefit of the demised property; and, at the expiration

* From explanatory terms elsewhere in the lease, it appears that "the Rhode Island Company" means "the Boston & Providence Railroad Corporation in Rhode Island."

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or earlier termination of this lease, it will return said demised road and property to the lessor as a railroad between Boston and Providence, with its now existing branches, and suitably equipped and provided with depots, stations, shops and other structures, of at least equal value with those now existing thereon, and in as good order and condition as the same now are, together with all permanent improvements thereon; and with rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment, of equal value with that hereby demised, according to the appraisal thereof.

"Ninth. The lessor will, upon the written request of the lessee, from time to time, convey to such person or persons as the lessee may appoint in such request such portions and parcels of the real estate owned by the lessor outside of its location, and not required by the lessee for railroad purposes, as the lessee may designate, and upon such reasonable terms and for such reasonable price as it may direct, at its expense, the proceeds to be received by the lessee; but upon an express agreement, however, by the lessee, that all proceeds thereof, or a sum equal thereto, shall be, or shall previously have been, from the funds of the lessee, applied to additions other than improvements upon the railroads of the lessor or their branches, or connected with their real estate, which shall thereupon become the property of the lessor, and subject to the provisions of this instrument; and if, at the expiration or earlier termination of this lease, the lessee shall not have expended in such additions a sum equal to the proceeds of the real estate so conveyed, the balance unexpended shall be paid over to the lessor without interest. But the lessor shall not be obliged, unless its directors consent, to convey any of its real estate in Boston east of the present Dartmouth Street bridge, or of the tract of land owned by it near the junction of its main road with the Dedham branch thereof, and between said branch and the New York & New England Railroad, containing about thirty-three (33) acres; upon which tract, unless thus previously conveyed, and unless it shall return the shops of the lessor now existing, the lessee shall, if not otherwise agreed with the directors of the lessor, place the shops which it is to return to the lessor upon the expiration or earlier termination of this lease, under the eighth article hereof."

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The defendants demurred. The demurrers were heard and were sustained by *Loring*, J., and a decree was entered dismissing the bill with costs. The plaintiffs appealed.

R. D. Ware, for the plaintiffs.

John Chipman Gray, *Roland Gray* & *F. A. Farnham*, for the defendants, were not called upon.

KNOWLTON, C. J. In 1888 the Boston and Providence Railroad Corporation, hereinafter called the Providence Company, leased its railroad, and substantially all its property, to the Old Colony Railroad Company, hereinafter called the Old Colony Company, for the term of ninety-nine years. In 1893 the Old Colony Company leased its railroad, including the property held under the lease from the Providence Company, to the New York, New Haven, and Hartford Railroad Company, hereinafter called the New Haven Company, for the term of ninety-nine years, and this last mentioned corporation succeeded to the rights and became subject to the obligations of the Old Colony Company under the first mentioned lease. The Legislature, by the St. 1896, c. 516, §§ 9–20, ordered the Providence Company to discontinue the use of its land east of Dartmouth Street in Boston for railroad purposes, to build a new station on Dartmouth Street, and to extend its road to the South Terminal station. This created a condition which was not definitely provided for by the lease, and was not contemplated by the parties. By a deed dated May 4, 1904, the Providence Company sold and conveyed to the New Haven Company all its land east of Dartmouth Street for one dollar and other valuable considerations. In the last part of the deed is this sentence: "For the above considerations, the New York, New Haven, and Hartford Railroad Company hereby agrees that it will, at its own sole cost and expense, assume the burden of any and all suits now pending, or which may hereafter be brought against said Boston and Providence Railroad Corporation, on account of the extension of its road to the terminal station in Boston, or in any way growing out of the same or connected therewith, and will defend or settle or pay the judgments in all such suits without cost to the said Boston and Providence Railroad Company." The Old Colony Company joined in the deed to express its assent thereto, and the deed was signed by each of these three corporations. This is a bill

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brought by three stockholders of the Providence Company, for themselves and in behalf of other stockholders, to obtain the cancellation of this deed. Demurrers of the defendants were sustained, the bill was dismissed, and the case is before us on an appeal by the plaintiffs.

The deed is in proper form to bind each of the three corporations interested in the property as lessor or lessee, and there is no averment nor suggestion that it is not binding upon the grantee and the Old Colony Company. It can hardly be contended that it was not in the power of the Providence Company to make such a deed, with the consent of the Old Colony Company, or to ratify it, if made by its officers in its behalf, without authority. We are left, therefore, with only the question whether such a deed, executed by the president of the corporation in its behalf, under the authority of a vote of the board of directors, is so contrary to law that it can be set aside on the application of a minority of the stockholders.

The principal contention of the plaintiffs is that, after the enactment of the statute, the lessee was bound by the terms of the lease to build an addition to the railroad from Dartmouth Street to the South Terminal station, and construct terminal accommodations for the transportation of freight and for other railroad purposes, at its own expense, and to turn over this property to be held by the Providence Company at the termination of the lease. This contention rests chiefly upon the eighth clause of the lease, which must be considered in connection with the ninth clause, and with other parts of the lease.

It is manifest that the parties did not contemplate such legislation or such a condition when the lease was made, and they did not attempt specifically to provide for it. They did, however, make a general provision for permanent improvements upon the railroad, and for additions to it, and they recognized a distinction between improvements and additions. Under clause eight of the lease, the lessee was to make all permanent improvements at its own expense, and, at the end of the lease, was to return the demised road and property to the lessor, with all permanent improvements thereon. Under the ninth clause there is a provision in reference to additions to the railroad other than improvements, whereby the lessee might request a conveyance

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by the lessor of real estate owned by the lessor outside of its location and not required by the lessee for railroad purposes, the money received for such property to be applied to additions to the railroad, other than improvements, which should "thereupon become the property of the lessor, and subject to the provisions of this instrument." Here is a plain implication that, in the absence of such a conveyance of property at the request of the lessee and an application of the proceeds to the cost of the additions, the additions would not be the property of the lessor, but would remain the property of the lessee at the termination of the lease. After the construction of the South Terminal station under the St. 1896, c. 516, and the extension of the railroad, so that the defendant could use the terminal station, the property east of Dartmouth Street was no longer required for railroad purposes, and it well might be appropriated by the Providence Company to payment for this addition to the railroad which had been provided by the New Haven Company, and to other proper purposes. There is nothing in the facts stated in the bill to indicate that the conveyance in question was not made for an adequate consideration, or that it was not for the interest of the Providence Company to make it. It does not appear what the other valuable considerations were in addition to the particular consideration mentioned in the last part of the deed. They may have been of very large value; indeed, from the answers and the documents annexed to them we infer that they were, although these answers and documents are not to be considered as a ground for our decision upon the demurrer. Certainly, in view of these unforeseen circumstances, it was equitable and proper for the Providence Company to sell this unused property, with the consent of all parties interested, and to acquire a title to the very valuable addition to its railroad and terminal facilities that had been procured and constructed at the expense of the New Haven Company, and which would remain the property of that company at the end of the lease, unless a conveyance of unused property was requested under the ninth clause of the lease, or some other arrangement was made. It was fitting that the Providence Company should make some equitable arrangement in regard to this, and, if necessary, should sell the real estate east of Dartmouth Street and use the proceeds as it did.

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If this was a proper thing for the corporation to do, we see no reason why the board of directors might not do it by virtue of their authority as managing officers. This was real estate no longer needed by the corporation for corporate uses. The directors might dispose of it, as they could sell other property in the interest of the corporation. There is nothing in the lease that limits the power of the directors in this particular. There is nothing in the lease inconsistent with their making any proper disposition of property which is not needed for railroad purposes, if the parties to the lease consent. Indeed, the provision in the ninth clause, that the lessor shall not be obliged to convey real estate east of the Dartmouth Street bridge "unless its directors consent," is an implication that matters of this kind are under their control.

We are of opinion that the deed is valid, and that the entry should be,

Decree affirmed.

OLD COLONY TRUST COMPANY, executor, *vs.* JAMES W. BAILEY.

Middlesex. March 16, 17, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Probate Court, Jurisdiction, Parties, Issues to jury, Conduct of trial. *Practice, Civil*, Exceptions. *Will*, Validity. *Fraud. Undue Influence.*

It seems that, if a part of a will is procured by undue influence and the rest of it is not, the Probate Court has jurisdiction to reject the part improperly procured, and to admit the residue to probate.

On an appeal from a decree of the Probate Court allowing a will, two issues for the jury were framed, the first, whether the will was procured to be executed by undue influence of one W., and the second, whether it was procured to be executed in whole or in part by undue influence of W., "and if in part, what part." At the trial there was evidence tending to show that certain bequests were so procured, and there was no evidence tending to show that other bequests, in which W. had no interest, were so procured. Both issues were submitted to the jury. W. alleged an exception to the submission to the jury of the second issue. *Held*, that the second issue properly was submitted to the jury.

An exception to an inaccurate statement, contained in a single sentence in a long charge of a judge to a jury, will not be sustained if it appears that the inaccu-

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racy was cured in what was said in the charge both before and after the sentence objected to.

While, at the trial of an appeal from a decree of the Probate Court allowing a will, an individual beneficiary under the will is not entitled to participate separately as of right, it nevertheless is within the discretion of the presiding justice to allow him to do so if it appears that there are contentions that ought to be made in support of the will that are adverse to other contentions that ought to be made in support of those parts of the will which affect such beneficiary.

A judge cannot be required to select a part of the testimony given at a trial and bearing on a certain question and to suggest to the jury in his charge what effect it may have by itself alone in some possible view that the jury may take of it.

APPEAL from a decree of the Probate Court for the county of Middlesex, allowing the will of Martha E. Bailey of Newton.

After the proceedings which are stated in the opinion, the following two issues were tried before *Braley*, J.: (1) "Was said instrument propounded for probate as the last will and testament of Martha E. Bailey procured to be executed by the undue influence of Frederick W. Webber?" and (2) "Was the instrument propounded for probate as the last will and testament of Martha E. Bailey procured to be executed in whole or in part by the undue influence of Frederick W. Webber, and if in part, what part?"

The will contained eighteen items. Of these, the first, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth and fifteenth items were directions for specific bequests and legacies to persons and charitable organizations not parties to this proceeding, almost all of the individuals so named being close friends or relatives of the testatrix, and none of the charitable organizations having been suggested by Dr. Webber. The second item related to the care of a family burial lot. The third devised to James Warren Bailey, the appellant, the testatrix's interest in the "homestead place" and certain personal property. The sixteenth item devised certain real estate to the trustee under the will to pay the net income to the appellant during his life, and then to convey the land to three charitable organizations, one of which was the Boston Home for Incurables. The seventeenth item devised and bequeathed the residue of the estate to the trustee, to pay the net income thereof to the appellant during his life, and after his death on the happening of various contingencies, to various beneficiaries, of whom Fred-

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erick W. Webber and the Boston Home for Incurables were two. The eleventh item gave to "my friend and physician Doctor Frederick W. Webber" "nine of my shares of Calumet and Hecla stock, and my circlet diamond ring of three stones to be used as a scarf ring." The eighteenth item appointed the executor and trustee.

Chester B. Humphrey, Esquire, an attorney in the employ of the Old Colony Trust Company, the executor and trustee named in the will, testified that the testatrix unaccompanied came to him in April, 1906, with memoranda for a will, and that they had some conversation on the basis of which he made a draft of a will for her and sent it to her. In this first draft, Dr. Webber was given twelve shares of Calumet and Hecla stock, instead of nine shares as in the final draft. Other provisions were practically the same, except that the trust as to real estate, which appeared in item sixteen of the will as finally executed, was not then provided for. This was added on May 21, 1906. On June 27, a provision was dictated providing for a small annuity to Dr. Webber. This was not in the will as executed. The will was executed on July 18, 1906.

Frederick W. Webber testified that he was a practising physician and had known the testatrix since 1902, and thereafter attended her continuously up to the time of her death, no other physician attending her during that period. The testatrix first spoke to him with regard to her making a will in the spring of 1905, asking him to act as executor. He refused. She brought the matter up repeatedly, and finally he suggested that she go to the Old Colony Trust Company. She told him from the beginning not to let her brother know of the will. He looked up for her the names of three charities. She did not make a bequest or give a legacy to any of them. He, the witness, never saw a draft of the will and did not know that there was to be a legacy for him, except as to a diamond ring. In June, 1907, he read the will for the first time. He knew that the testatrix had written out certain memoranda, which he had seen, for use in making her will.

Dr. Webber also testified of complaints by the testatrix to him as to the treatment of her by her brother, the appellant, of statements by the executrix that the appellant had used violence upon

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her, and of marks of violence which he, the witness, had found upon the person of the testatrix, and which she had told him were caused by the appellant.

Dr. Webber also testified that in September, 1906, the testatrix left the house where she had been living with her brother and went to board with a lifelong friend, where she remained until she died on August 13, 1907. In the meantime, because of her inability owing to illness to attend to her business affairs personally, Dr. Webber had been attending to the affairs of the testatrix for her. A brokerage firm objecting to recognizing certain signatures made by her mark, Dr. Webber and others suggested that she execute a trust deed. She asked him to act as trustee and he repeatedly refused, but finally, after she had refused to accept various men of well known standing as trustee, he consented, and, with the advice and assistance of her own counsel, a trust deed was executed on March 6, 1907. The deed in substance placed all the property of the testatrix in the control of the trustee for management, for payment to the testatrix or her order of the net income, and for disposition after her death according to the directions of her will or according to law if she died intestate.

Dr. Webber also testified that during April, 1906, he made seven professional visits upon the testatrix; during May, 1906, ten; during June, 1906, five and, previous to July 18 in July, 1906, three. In January, February and March, 1907, he visited her almost daily. He testified that such visits always were necessary for her proper treatment, and that his bills all were paid promptly excepting those covering a short period before the death of the testatrix.

There was other evidence both in confirmation of and in contravention of the foregoing testimony of Dr. Webber.

At the close of the evidence, the presiding justice permitted counsel for the Boston Home for Incurables and for Frederick W. Webber to address the jury; and the appellant excepted.

The appellant requested the following rulings among others:

"12. If the jury find that Dr. Webber did exercise undue influence over the testatrix in the matter of the making of her will, it does not necessarily follow because she made some bequests and legacies to her distant relatives and friends and to charities

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that such bequests and legacies are valid, and that as to these bequests she was free from such influence, for the jury might also find that this was a part of his scheme to cover his own wrongdoing and make this will as a whole seem just and reasonable.

"13. If the jury find that Dr. Webber did exercise undue influence over the testatrix in the matter of the making of her will, and that in doing so his only interest was in his own legacy, yet if you find that in making the other bequests and legacies to her distant relatives and friends and to charities she was influenced by him with the intent on his part to make his own legacy seem more reasonable, such other bequests and legacies must be found to be likewise affected by his undue influence and cannot stand."

Counsel for Dr. Webber requested that the following ruling be given:

"The instrument executed by Martha Ella Bailey July 18, 1906, in the presence of three attesting witnesses, having been proved to be an act apparently deliberate, and executed with all usual and legal formalities by a competent person, is to be accepted and allowed as her last will and testament, unless the party seeking to avoid and destroy it prove that an influence was exercised over the testatrix by Frederick W. Webber at the time, which constrained her to do that which was contrary to her will and desire, but which she was unable to refuse to do."

At the close of the charge, the presiding justice stated: "I have been asked by various counsel in this case to give certain instructions, and in so far as I have not covered or given them in the instructions to the jury, I save their several exceptions."

The findings of the jury upon the issues are stated in the opinion. The appellant and Frederick W. Webber alleged exceptions.

Other facts are stated in the opinion.

W. A. Morse, (*F. J. Geogan* with him,) for the appellant, James W. Bailey.

R. W. Bartlett, for Frederick W. Webber.

E. H. Warren, for the Boston Home for Incurables.

F. N. Wier, (*W. A. Rollins* with him,) for the executor.

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KNOWLTON, C. J. This is an appeal from a decree of the Probate Court, allowing the will of Martha E. Bailey, deceased. After a verdict upon an issue framed for a jury had been set aside as against the evidence, an additional issue was framed, numbered two, which, as afterwards amended and submitted to the jury, was as follows: "Was the instrument propounded for probate as the last will and testament of Martha E. Bailey procured to be executed in whole or in part by the undue influence of Frederick W. Webber, and if in part, what part?" To this issue the jury subsequently answered, "Yes, that all the bequests made in favor of Dr. Frederick W. Webber, mentioned in clauses number eleven, number sixteen and number seventeen be stricken from the will of Martha E. Bailey." The first issue, as to whether the whole will was procured by undue influence, they answered in the negative.

The second issue was framed because the first trial suggested the question whether a part of the will might not have been procured by undue influence, while the larger part of it was a valid expression of the desire of the testatrix. Dr. Webber, referred to in the issue, and the Boston Home for Incurables, another legatee named in the will, as well as the executor and the appellant, were heard by the justice on the framing of this issue, and there was no appeal from the order, and no exception was taken. It having been intimated subsequently, at the trial before another justice, that only the executor and appellant had any standing to be heard as parties, and up to this time no request having been made by others to participate in the trial, the counsel for Dr. Webber, while Dr. Webber was under cross-examination as a witness, claimed a right in his behalf to take a part in the trial. At first his claim was refused, and he took an exception. But very quickly, before the examination of Dr. Webber had proceeded much further, the justice told him that he might participate in the trial as fully as he pleased, and might argue the case to the jury if he desired. Thereafter he took part in the trial so far as he desired, and argued the case to the jury. He did not request the recall of any witness.

At the conclusion of the contestant's testimony, and again at the conclusion of all the evidence, he asked the justice to withdraw the second issue from the jury, on the ground that no

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testimony had been offered to prove that any particular part of the will had been procured by the fraud or undue influence of Frederick W. Webber, and that the testimony had been offered to prove that the whole will had been so procured. This request was not founded on any contention that the issue was not properly framed originally, or that, upon proper evidence, the will might not be found to be procured by fraud in part and to be good in other parts. That this may be so found seems to be generally held by the courts, although it has never been distinctly decided in this Commonwealth. *Trimlestown* v. *D'Alton*, 1 Dow & Cl. 85. *Allen* v. *M'Pherson*, 1 H. L. Cas. 191, 209. *Harrison's Appeal*, 48 Conn. 202. *Rockwell's Appeal*, 54 Conn. 119. *Morris* v. *Stokes*, 21 Ga. 552. *Eastis* v. *Montgomery*, 93 Ala. 293, 299. *Steadman* v. *Steadman*, 10 Sad. (Penn.) 539. See Wms. Ex. (10th ed.) 291. 1 Jarm. Wills, (6th ed.) 37. Woerner, Law of Administration, (2d ed.) § 222. Decisions in this State assume or imply that this is the law. *O'Connell* v. *Dow*, 182 Mass. 541, 552. *Ogden* v. *Greenleaf*, 143 Mass. 349. Wills have been proved in this Commonwealth to take effect in part and to be void in part. *Deane* v. *Littlefield*, 1 Pick. 239. *Holman* v. *Perry*, 4 Met. 492. *Heath* v. *Withington*, 6 Cush. 497.

Considered in reference to the evidence to which it was directed, this request was without foundation. There was evidence in the circumstances to indicate that the other bequests contained nothing to lead to the belief that Dr. Webber prompted them. This request was rightly refused.

The request to instruct the jury that the party seeking to set aside this will on the ground of undue influence must prove that an influence was exercised "which constrained her (the testatrix) to do that which was contrary to her will and desire, but which she was unable to refuse to do," was fully covered by the language of the charge.

Dr. Webber's counsel excepted to this part of the charge: "If you should find as you have listened to this evidence, that the getting of the trust deed was simply another act of undue influence, that is not the question at all. It is whether or not her condition of mind when she gave that trust deed to him, and because she gave it, is evidence tending to show a like condition

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of mind when she made the will. That is to say, having once got control of her mind, was it a permanent condition?" The sentence at the end of this quotation evidently was not an accurate expression of what was in the justice's mind. The will was made before the testatrix made the trust deed to Dr. Webber. But the subject was afterwards discussed at length by the justice, this part of the charge covering nearly two printed quarto pages, and with such general clearness of expression as to show that the jury could not have misunderstood the proper application of this evidence. The inaccuracy of expression in a single sentence was cured by what was said before and afterwards. The exceptions of Dr. Webber are overruled.

The appellant filed a bill of exceptions on another ground. He contended that it was an error in law to permit Dr. Webber and the Boston Home for Incurables to participate in the trial, and he excepted to the order of the presiding justice allowing it.

It is true, as the appellant contends, that a petition for the probate of a will is a proceeding *in rem*. *Bonnemort* v. *Gill*, 167 Mass. 338. *McKenna* v. *McArdle*, 191 Mass. 96. It is also true, as a general rule, that the interests of legatees claiming under a will are properly and sufficiently represented by the executor, and, notwithstanding the dictum to the contrary in *Eliot* v. *Eliot*, 10 Allen, 357, 359, individual legatees are not entitled as of right to appear separately and become parties to a petition for the probate of a will. The representation of the estate and the conduct of the trial usually should be left to the executor. But if it appears that one legatee has important interests adverse to those of the legatees generally, or if for any reason, under the issues submitted to the jury, there are contentions that ought to be made in support of the will which are adverse to other contentions that ought to be made in support of some part of the will, it is in the discretion of the presiding justice to allow parties differently interested to appear and be heard in support of their respective contentions. In the present case the two issues presented such conditions. The executor was willing that these two legatees, whose interests were to a certain extent antagonistic, should be heard in support of their respective views. Indeed, in this court the executor's counsel was so far in doubt

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as to what action he should take as between the adverse contentions of these two legatees in regard to the substantive matters in dispute between them, that he presented no argument in regard to them. While we are of opinion that, as a rule, individual legatees should not be permitted to be heard in behalf of their personal interests in a proceeding of this kind, we think that, in the present case, the discretion of the court was wisely exercised. See *O'Connell* v. *Dow*, 182 Mass. 541. This exception must be overruled.

The only other exception of the appellant is to the refusal of the presiding justice to give the twelfth and thirteenth rulings requested by the appellant. The first of these called for an instruction to the jury as to the effect that might be given to a part of the evidence, in reference to a possible view that might be taken of it in its bearing upon the general question to which it related. It has often been decided that a judge cannot be required to select a part of the testimony bearing upon a question, and to suggest what effect it may have, by itself alone, in some possible view that the jury may take of it. *Shaw* v. *Tompson*, 105 Mass. 345, 350. *Delaney* v. *Hall*, 130 Mass. 524. *Bugbee* v. *Kendricken*, 132 Mass. 340. *Hicks* v. *New York, New Haven, & Hartford Railroad*, 164 Mass. 424, 428. *Henderson* v. *Raymond Syndicate*, 183 Mass. 443, 447. *Lakeside Manuf. Co.* v. *Worcester*, 186 Mass. 552, 559. The thirteenth request was given in substance, although not in the same language, in the charge.

Exceptions overruled.

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ELIZA G. TRAISER *vs.* COMMERCIAL TRAVELLERS' EASTERN ACCIDENT ASSOCIATION.

Suffolk. March 17, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Insurance, Accident. *Contract*, Construction. *Words*, "Satisfactory."

The meaning of an agreement by a fraternal beneficiary corporation, contained in a certificate issued to a member, that it will pay to the beneficiary appointed under the terms of a certificate a stipulated amount within ninety days from the receipt by its board of directors "of proof satisfactory to said board of the death of" the member "and that his death has been caused wholly and entirely by external, violent, and accidental means," is that the proof thus furnished must be such as ought to be satisfactory to reasonable men acting reasonably.

Where at the trial of an action upon a certificate of fraternal beneficiary insurance which required, before payment of a death benefit, that the board of directors of the corporation issuing the certificate should have received "proof satisfactory to said board of the death of" the member to whom the certificate was issued "and that his death has been caused wholly and entirely by external, violent, and accidental means," it appeared that after the death of the certificate holder the beneficiary and a physician, who attended the certificate holder after the accident which was alleged to have caused the death, furnished to the defendant's board of directors affidavits that the death was caused wholly and entirely by external, violent and accidental means, that the board requested further affidavits, which the plaintiff furnished, namely, a second affidavit by the attending physician, and one by a physician who had attended the deceased before the accident, in one of which the affiant refused to say that the death was caused by the accident, and in the other of which the affiant stated on information and belief that the death was not so caused. The board thereupon rejected the claim. The presiding judge refused to allow the jury to consider the two additional affidavits. *Held*, that the question, whether under the circumstances the defendant's board of directors acted reasonably in rejecting the plaintiff's claim upon the proof submitted to them, was for the jury, and that in determining that question, while the jury should not be allowed to consider other evidence than that which was submitted to the directors, they should have been allowed to consider all the affidavits which the directors considered.

Although, in an affidavit by the physician who was in attendance upon the holder of a certificate issued by a fraternal beneficiary corporation at the time of his death following an accident, the physician has declined to state positively that death was or was not the result of the accident, the plaintiff in an action subsequently brought against the corporation by the beneficiary named in the certificate to recover the amount named therein is not by such affidavit precluded from introducing in evidence testimony of such physician and of other medical experts tending to show that the death of the certificate holder was caused by the accident within the terms of the policy. Anything to the contrary in *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, referred to as discredited by subsequent decisions.

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At the trial of an action by the beneficiary named in a certificate of fraternal beneficiary insurance against the corporation issuing it, to recover for benefits agreed in the certificate to be paid upon the death of the certificate holder, the jury should not be allowed to consider, upon the issue whether the death of the certificate holder was caused by a certain accident, preliminary affidavits furnished by the plaintiff to the defendant tending to establish that fact, which were furnished according to a requirement in the certificate that preliminary proof of such fact should be so furnished within ninety days of the accident, such affidavits being admissible only to show that the plaintiff had satisfied requirements of the certificate as to such preliminary proof.

CONTRACT upon a certificate of fraternal benefit insurance to recover a death benefit. Writ in the Superior Court for the county of Suffolk dated December 4, 1903.

The case was tried before *Lawton*, J. The facts are stated in the opinion. The jury found for the plaintiff; and the defendant alleged exceptions.

The case was submitted on briefs.

W. F. Merritt & N. T. Merritt, Jr., for the defendant.

G. R. Blinn & A. L. Taylor, for the plaintiff.

SHELDON, J. The defendant's agreement, as stated in the certificate of insurance, was that it would pay the stipulated amount to the beneficiary appointed under the certificate within ninety days from the receipt by its board of directors "of proof satisfactory to said board of the death of" John Gourley, "and that his death has been caused wholly and entirely by external, violent, and accidental means." Its liability accordingly did not arise until the presentation of such proof to its board, not only of the death but also of the fact that the cause of the death was that mentioned in this stipulation. *Hatch* v. *United States Casualty Co.* 197 Mass. 101. *Union Institution for Savings* v. *Phœnix Ins. Co.* 196 Mass. 230, 236. *North American Ins. Co.* v. *Burroughs*, 69 Penn. St. 43. In this respect the case differs from many of those relied on by the plaintiff, in which proof only of the death was called for, without such an additional requirement as is made here. *Flynn* v. *Massachusetts Benefit Association*, 152 Mass. 288. *Taylor* v. *Ætna Ins. Co.* 13 Gray, 434. *Bowen* v. *National Life Association*, 63 Conn. 460. *Insurance Co.* v. *Rodel*, 95 U. S. 232.

It appeared at the trial that the plaintiff had furnished to the defendant, in accordance with this condition of the policy, cer-

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tain proof which included, among other sworn statements, her own affidavit and that of one Johnston, the physician who had attended the deceased member after the accident which it was claimed caused his death. The defendant then sent to the plaintiff some additional questions which it asked to have answered by Dr. Johnston. The plaintiff without objection procured through her then attorney an affidavit from Dr. Johnston, answering those questions in detail, and transmitted it to the defendant. By this affidavit it appeared that a Dr. Canfield had been the regular physician of Gourley, and had seen him just before his death. The defendant thereupon sent to the plaintiff's then attorney a list of questions to be answered under oath by Dr. Canfield, and the attorney procured and sent to the defendant an affidavit from Dr. Canfield, answering those questions. The defendant's board of directors, treating these three sets of papers as the proof furnished by the plaintiff, rejected her claim; and this action was then brought by her to recover upon the policy.

The presiding judge at the trial ruled, at the request of the plaintiff, that the affidavits first furnished to the defendant by the plaintiff constituted the proof which she was required to furnish, and that the subsequent affidavits of Drs. Johnston and Canfield were not a part of such proof; and this presents the first question raised upon the defendant's exceptions.

The proofs to be furnished by the plaintiff were by the terms of the policy to be satisfactory to the defendant's board of directors. This, to be sure, does not mean that the judgment of the defendant's board necessarily was to be final on the matter, but only that the proofs must be such as ought to be satisfactory to reasonable men acting reasonably. Accordingly it ordinarily will be for the jury, looking at the proof actually furnished, to say whether it was such as reasonably should have satisfied the directors. *Noyes* v. *Commercial Travellers' Eastern Accident Assoc.* 190 Mass. 171, 182, and cases cited. *C. W. Hunt Co.* v. *Boston Elevated Railway*, 199 Mass. 220. *Cashman* v. *Proctor*, 200 Mass. 272. But it was the duty of the directors to consider in the first instance the proof submitted by the plaintiff, to weigh it, and to make up their minds whether it ought to satisfy them as reasonable men. If they thought that further proof was

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needed to enable them to reach a conclusion, we see no reason why they should not call for it. And their right to do so has been affirmed or assumed in many decisions. See for example *Martin* v. *Manufacturers' Accident Indemnity Co.* 151 N. Y. 94, 106. *Baldi* v. *Metropolitan Ins. Co.* 24 Penn. Sup. Ct. 275. In *Braunstein* v. *Accidental Death Ins. Co.* 1 B. & S. 782, the right of the directors to obtain and consider such further evidence or information, if any, as they should think necessary, was fully recognized. In *Buffalo Loan, Trust & Safe Deposit Co.* v. *Knights Templar Assoc.* 126 N. Y. 450, 453, in which only proof of death was required, the court said: "The words 'satisfactory proof' entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty, and if the proofs furnished failed to satisfy the association of the fact of the death, the association acting reasonably and in good faith could require further evidence." In some cases, not only is it assumed that new proof may be called for, but it is held that the doing so is a waiver of objection which might have been taken to the sufficiency or seasonableness of that already presented. *McElroy* v. *John Hancock Ins. Co.* 88 Md. 137, 150. *Trippe* v. *Provident Fund Society*, 140 N. Y. 23, 28. *Standard Ins. Co.* v. *Davis*, 59 Kans. 521, 527. *Hohn* v. *Inter-State Casualty Co.* 115 Mich. 79. In *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, additional proofs were furnished by the insured and were considered without objection; and the right of the insured to make additional proof and to correct errors in that already furnished was asserted. This point has never since been questioned, though upon the main point decided the case has been often doubted and limited. We find nothing at variance with this doctrine in *Goldschmidt* v. *Mutual Life Ins. Co.* 102 N. Y. 486, or *Louis* v. *Connecticut Ins. Co.* 58 App. Div. (N. Y.) 137. It may well be that if the right to call for further proof is given by the terms of the policy to only one officer of the insuring company it cannot be exercised by another; and that is all that was decided in *Tessmann* v. *United Friends of Michigan*, 103 Mich. 185.

It is of some importance that the plaintiff acquiesced in the request of the defendant for these additional affidavits, and furnished them through her then attorney, who must be taken

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on the record to have acted with her consent and by her authority. We need not consider what her rights would have been if she had not done so, but had elected to stand upon the proof already furnished. *Metropolitan Ins. Co.* v. *Mitchell*, 175 Ill. 322.

We are of opinion that the judge erred in ruling that the affidavits of Johnston and Canfield were not a part of the preliminary proof, furnished by the plaintiff to the defendant in accordance with the requirement of the policy.

The question whether upon this complete proof it would have been open to the jury to say that the board of directors, acting as reasonable men, ought to have been satisfied, not only of the death of the insured, but that his death was "caused wholly and entirely by external, violent and accidental means," is somewhat difficult. Upon this question the affidavits disclosed evidence which would have warranted diametrically opposite answers. They showed that there had been severe accidental injuries, followed within two days by death which, upon the statement first made by Dr. Johnston, seemed to be the direct result of those injuries. This view was supported by the affidavit of the plaintiff, and by those of Farnsworth and of the undertaker, so far as they could be taken to have spoken from knowledge. But in his subsequent affidavit Dr. Johnston stated, upon information, that the deceased had suffered from a pre-existing sickness, and declined to say positively that death was or was not the result of the accident. Dr. Canfield in his affidavit declared that the death was not caused wholly by external, violent and accidental means, that the deceased had been under the deponent's medical treatment for acute nephritis for approximately two months, and that the death was due to uræmic convulsions. Upon this state of the evidence, the defendant's counsel have argued with great force that the jury should not be allowed to say that the directors, acting as reasonable men in a fiduciary capacity (*Elliott* v. *Baker*, 194 Mass. 518, 523; *Palmer* v. *Northern Relief Assoc.* 175 Mass. 396, 397), ought to have decided that they were satisfied that the death was due wholly and entirely to the injuries sustained by the accident. As this question is likely to be raised again at a new trial, in substantially the same way, it ought now to be considered.

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This question, it must be remembered, is to be decided solely upon the evidence furnished to the directors. As was stated in *Noyes* v. *Commercial Travellers' Eastern Accident Assoc.* 190 Mass. 171, 181, the issue upon this branch of the case is not what was actually the cause of the death, but whether the plaintiff had furnished sufficient proof to the directors. Without showing that she has done this, she cannot maintain the action. But with some hesitation we have reached the conclusion that the question whether she has maintained this burden is for the jury. It is clear from what already has been said that from the evidence stated, without considering the additional evidence put in at the trial, which of course cannot be considered upon this issue, the jury might find that the death was due wholly and solely to the accidental injuries. If the jury should so find, we are of opinion that they also would have the right to say that the same fair preponderance of the evidence which had convinced their judgments ought to have produced the same conviction in the minds of other reasonable men. It would be an anomaly for us to decide otherwise. It cannot be said as matter of law that reasonable men were bound to come to only one conclusion. *Webber* v. *Cambridgeport Savings Bank*, 186 Mass. 314, 315. It is not for the defendant, in a case of contradictory evidence, finally and decisively to pass upon the rights of the insured, if such a condition as this has been reasonably complied with. *Taylor* v. *Ætna Ins. Co.* 18 Gray, 434, 438. *Insurance Co.* v. *Rodel*, 95 U. S. 232, 237.

The other questions discussed at the argument may be more briefly considered.

The testimony of Dr. Johnston and of the medical experts to their opinion that the death of Gourley was due to the accident and not to uræmic convulsions, was competent upon the issue of what was the real case of the death. It cannot be held to be incompetent because it tended to contradict some of the statements of opinion contained in the preliminary proof furnished by the plaintiff. The case of *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, so far as it tends to support this contention of the defendant, has been discredited by subsequent decisions. *Abraham* v. *Mutual Reserve Fund Association*, 183 Mass. 116. *Barker* v. *Metropolitan Ins. Co.* 198 Mass. 375, 382, and cases cited.

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John Hancock Ins. Co. v. *Dick*, 117 Mich. 518. The preliminary proof was not necessarily a bar to the maintenance of the action.

The jury ought not to have been allowed to consider the statements made in the preliminary proofs of death as evidence in favor of the plaintiff upon the issue of what was the real cause of Gourley's death. These papers were admissible for the plaintiff and could be considered in her favor only upon the issue of the sufficiency of the proof submitted by her to the defendant's directors. This is settled both upon reason and authority. *Cluff* v. *Mutual Benefit Life Ins. Co.* 99 Mass. 317, 324. *Cook* v. *Standard Life & Accident Ins. Co.* 84 Mich. 12. *Senat* v. *Porter*, 7 T. R. 158. How far these statements would have been competent against her, as admissions made or adopted by her, need not now be considered. *Mutual Life Ins. Co.* v. *Newton*, 22 Wall. 32. *Wall* v. *Continental Casualty Co.* 111 Mo. App. 504.

Exceptions sustained.

WILLIAM A. WHITING *vs.* MALDEN AND MELROSE RAILROAD COMPANY & another.

Suffolk. March 18, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Corporation. Evidence, Presumptions and burden of proof, Inferential. *Street Railway*, Consolidation. *Estoppel. Malden and Melrose Railroad Company. West End Street Railway Company. Equity Jurisdiction.*

In the absence of a statutory provision on the subject, the mere acquisition of all the capital stock, property and assets of a corporation by an individual or by another corporation does not of itself make the new holder liable to pay the debts of the vendor corporation.

In the absence of evidence to the contrary, there is a presumption that the action of a street railway corporation in the purchase under the provisions of a special statute of the capital stock, property and assets of another street railway corporation is lawful.

In the absence of evidence to the contrary, there is always a presumption that the official action of a board of public officers is lawful.

The West End Street Railway Company, after the enactment of St. 1887, c. 413, acquired by purchase from one who had purchased them from the Malden and Melrose Railroad Company all of the capital stock, property and assets of that company, and its treasurer then reported to the railroad commissioners that the

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West End Street Railway Company "owned the stock and property of the Malden and Melrose Company — all of it — and would like to have the Malden and Melrose Railroad Company report omitted." The commissioners thereupon struck the Malden and Melrose Railroad Company from their lists and reported "The Malden and Melrose having been merged in the West End by the purchase of all of its capital stock and assets." Thereafter for more than twenty years the West End Street Railway Company operated the system formerly of the Malden and Melrose Railroad Company as its own. In a suit in equity to compel the West End Street Railway Company to pay judgments rendered against the Malden and Melrose Railroad Company before 1887, of which the West End Street Railway Company was ignorant at the time of the purchase, it was *held*, that fair inferences from the above facts were that the terms and conditions of the purchase by the West End Street Railway Company were duly approved by the directors and by a majority of the stockholders of each of the corporations and by the railroad commissioners, as required by St. 1887, c. 418, § 1; or at any rate that the West End Street Railway Company was estopped to deny that such were the facts, and therefore that, since under those circumstances by force of § 1 the West End Street Railway Company became subject to the liabilities of the Malden and Melrose Railroad Company, the suit might be maintained.

The owner of a judgment recovered before the enactment of St. 1887, c. 418, with regard to the purchasing by the West End Street Railway Company of the stock, property and assets of other street railway companies and consolidating with them, against a street railway company, whose entire capital stock, property and assets the West End Street Railway Company purchased in accordance with the statute, has a claim under § 1 of the statute against that company irrespective of whether the company knew at the time of its purchase of the existence of the judgment or not, and can maintain a suit in equity against both companies to enforce payment of the judgment by the West End Street Railway Company.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on September 29, 1890, and afterwards amended, seeking to compel the defendant West End Street Railway Company to pay judgments against its alleged predecessor, the defendant Malden and Melrose Railroad Company.

The material portions of the tenth paragraph of the amended bill, referred to in the opinion, were as follows:

"The plaintiff therefore says that the West End Street Railway Company will, in view of all the premises aforesaid, be assumed to have consolidated, in law as well as in fact, with the Malden and Melrose Railroad Company, either directly and by virtue of said act of 1887 or indirectly through the consolidation with the Boston Consolidated Street Railroad Company, and that, in either event, the West End Street Railway Company has, by the provisions and effect of said statutes, rendered itself liable for the debts of the Malden and Melrose Railroad

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Company, and, among the rest, to the judgments and claims due to the plaintiff in this suit, which the West End Street Railway Company is therefore bound to assume and pay. That the West End Street Railway Company is now openly and publicly dealing with the property, rights, and locations of the Malden and Melrose Railroad Company as the property of the West End Company, and is expending a large sum of money upon said property, rights, and locations, and is deriving a large and ever increasing income therefrom, and is for every purpose and in every way using and enjoying the Malden and Melrose Railroad in the same manner and as fully as if it had directly consolidated with that company in the manner provided by said statute of 1887, and therefore, and in view of all the premises aforesaid, the West End Street Railway Company is estopped to deny that it has consolidated with said Malden and Melrose Railroad Company, directly or indirectly, as aforesaid, so as to have become directly liable for its debts and obligations, and, among the rest, the judgments and claims of the plaintiff."

The case was referred to John Chipman Gray, Esquire, as master, and, after a hearing on certain exceptions to a report filed by him, was recommitted to him, and he thereupon filed a supplemental report. Material portions of the reports were as follows:

"1. The plaintiff is the assignee of four judgments against the Malden and Melrose Railroad Company, amounting to $20,195.25, which sum, with interest from November 1, 1880, is now due to him from said company. . . .

"4. On March 31, 1862, by agreement under seal between the said company and the Middlesex Railroad Company, . . . the former purported to transfer to the latter, absolutely and in fee, all its property, real and personal (except its roadbed and franchises), and its rights under contract with other street railroad companies, and granted to it for forty-two years 'the exclusive right to use, occupy, run over, operate and control its road or track.'

"5. The Middlesex Company was, by St. of 1886, c. 229, consolidated with the Highland Street Railway Company, under the name of the Boston Consolidated Street Railway Company,

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and was itself dissolved as a separate corporation; and by St. of 1887, c. 413, the Boston Consolidated Street Railway Company was consolidated with the West End Street Railway Company, and was itself dissolved as a separate corporation. . . .

"11. The Middlesex Railroad Company took possession of the road of the Malden and Melrose Railroad Company and of the roads of the other said companies, and of the equipment and lands (other than roadbeds) of the Malden and Melrose Railroad Company, and paid to the latter company full value for said equipment and lands. . . .

"17. I find that the Middlesex Railroad Company operated the Malden and Melrose road as part of its own system; that it kept no separate account of the earnings received from the use of the Malden and Melrose Railroad Company; that the failure to keep such separate account does not appear to have been from a fraudulent motive; and that it would have been extremely difficult, if not impossible, to keep such separate account.

"18. The Middlesex Railroad Company, for many years both before and after 1874, in its returns to the railroad commissioners stated that it operated the Malden and Melrose Railroad, and also the short pieces of the Medford and Charlestown Railroad and of the Somerville Horse Railroad mentioned above. . . .

[Paragraphs twenty-two, twenty-three and twenty-four are stated in the opinion.] . . .

"25. The plaintiff has proceeded in this bill in equity against the Malden and Melrose Railroad Company, whose alleged creditor he seeks to garnishee; he cannot in the same bill claim that it has lost its identity by consolidation.

"26. The claim of the plaintiff against the Malden and Melrose Railroad Company is a legal demand; if there had been a consolidation, the claim against the West End Street Railway Company would be a legal demand for which the plaintiff has a full, adequate, and complete remedy at law.

"27. I find, therefore, that the bill should be dismissed against both defendants, but that the dismissal against the Malden and Melrose Railroad Company should be without prejudice. . . .

"48. I have made findings of law which I am aware are not within the proper functions of a master, but I have done so at the request of the counsel of both parties. . . ."

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Exceptions to the original report were filed by the plaintiff, most of which are described in the opinion. The exception to the twenty-sixth paragraph of the report, referred to in the opinion, was as follows:

"The plaintiff excepts to the master's ruling in paragraph 26 of his report as inconsistent with the contention made by the plaintiff in his argument before the master, that the West End Company, irrespective of any liability it may be under to the Melrose Company, is directly responsible to the plaintiff as a creditor of the Melrose Company, by reason of the fact that the West End Company has taken possession of all the assets of the Melrose Company and is therefore chargeable in equity with an obligation to apply such assets to the payment of the plaintiff's claim; and the plaintiff excepts on the ground that the master has refused to rule in accordance with such contention of the plaintiff."

Other facts are stated in the opinion.

The case was heard by *Hammond*, J., upon exceptions to the reports of the master, and by him reported to the full court, "for the determination of the question what disposition should be made of the exceptions taken by the complainant to the twenty-fourth, twenty-fifth, and twenty-sixth findings of the master in his original report, and of the tenth exception of the respondents to the master's report on the recommittal; such order to be entered as, in the opinion of the Supreme Judicial Court for the Commonwealth, law and justice require."

H. L. Harding & J. B. Warner, (*R. S. Warner* with them,) for the plaintiff.

T. Hunt, for the defendants.

KNOWLTON, C. J. This report brings before us questions founded on the plaintiff's exceptions to the twenty-fourth, twenty-fifth and twenty-sixth findings of the master in his original report, in connection with the pleadings and other facts in the case. The plaintiff contends that the defendant, the West End Street Railway Company, hereinafter called the West End Company, has become liable to pay the judgments held by the plaintiff against the Malden and Melrose Street Railroad Company, hereinafter called the Malden and Melrose Company, because of an alleged union and merger of these two

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corporations. The findings of the master on this point are as follows:

"22. One other claim was made by the plaintiff, namely, that the Malden and Melrose Railroad Company had been consolidated with the West End Street Railway Company, and that therefore the latter is liable for the debts of the former. The West End Street Railway Company conceded that, if there had been such consolidation, it would be liable for such debts; but it denied that there was such a consolidation.

"23. I find that the stock in the Malden and Melrose Railroad Company was gradually acquired by the Middlesex Railroad Company and its successors; that, after the agreement of 1862, the former company took no corporate action except for the choice of officers; that the officers of both companies, in their reports to the railroad commissioners for many years after 1862, stated that the former company was being operated by the latter company, under the terms of said agreement; that for many years prior to the consolidation of the Middlesex Railroad Company and the Highland Street Railway Company, in 1886, the president of the Middlesex Railroad Company had owned more than a majority of the stock of the Malden and Melrose Railroad Company, which he had acquired since the lease of 1862; that after the formation of the West End Street Railway Company, he transferred all of this stock to Henry M. Whitney, the president of the West End Street Railway Company, and the stock was then transferred to the said West End Street Railway Company, which reimbursed Mr. Whitney for the amount paid by him; that after this transfer to the West End Street Railway Company the treasurer of that company reported to the railroad commissioners that they 'owned the stock and property of the Malden and Melrose Company, — all of it — and would like to have the Malden and Melrose Company report omitted'; that the railroad commissioners struck the Malden and Melrose Company from their lists, and reported as follows: 'The Malden and Melrose, having been merged in the West End by the purchase of all its capital stock and assets,' etc.

"24. I find that there was no such consolidation as the plaintiff alleges. It was admitted by the plaintiff that the statutory requirements for the consolidation had not been complied with.

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The taking possession of the property of one corporation by another, the buying of the stock of the former by the latter, or the entire disregard of the rights of the former by the latter, as alleged, would not constitute a consolidation, making the latter directly liable for the debts of the former." He also finds that all the property of the Malden and Melrose Company, and all rights and benefits from the use of it that have come to the West End Company, so far as it is practicable to discover and separate them, except those from the use of the property since 1887, have been paid for at more than their full value.

It is very plain that, in the absence of a statutory provision on the subject, the acquisition of all the stock, property and assets of a corporation, by an individual or by another corporation, does not of itself make the new holder liable to pay the debts of the corporation. A mere purchase of such capital stock and assets is a taking of a title, which leaves unsecured creditors with no claim against the purchaser, and with no means of collecting their debts except from the corporation itself. *Shaw* v. *Norfolk County Railroad*, 16 Gray, 407. *Ewing* v. *Composite Brake Shoe Co.* 169 Mass. 72. In the present case there is no ground for a claim of direct liability of the West End Company to the plaintiff upon these judgments, outside of the St. 1887, c. 413, which provides for a consolidation and union of the West End Company with any or all of the other street railway companies authorized to run cars in or into the city of Boston, and for such a consolidation and union of each of these other street railway companies with the West End Company, or any other of said companies, and for the purchase and holding of the whole or any part of the property, rights and franchises of any or all of these companies by any of the others. It becomes necessary to consider this statute, to see whether a liability for these judgments has been created under it.

It provides in § 1, that, "In every case of consolidation as aforesaid, the corporations uniting shall constitute a new corporation under such name as shall be agreed upon in the manner and at the meetings aforesaid; but the calling of the first meeting of said new corporation . . . shall be provided for in its articles of consolidation," etc. This shows that, in case of a union by consolidation, a new corporation is formed.

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There may be a purchase and holding of "the whole or any part of the property, rights and franchises of any or all of" these corporations. "In every case of purchase by one corporation of the entire property, rights and franchises of another or others, as aforesaid, the corporation purchasing shall have, hold, possess, exercise and enjoy all the locations, powers, privileges, rights, franchises, property and assets which, at the time of such purchase, shall be had, held, possessed or enjoyed by the corporation or corporations selling, or either or any of them, and shall be subject to all the duties, restrictions and liabilities to which they, or either, or any of them shall be subject." This is another and different provision, whereby one of these corporations may acquire all the rights and become subject to all the liabilities of another corporation without any formal and technical consolidation of the two. By mere purchase, all the rights and franchises pass with its property from one corporation to the other, and, if the selling corporation survives in name, it has no powers, or franchises, or anything else of value. It is, therefore, a union and virtual consolidation, although it is not the statutory consolidation mentioned in the section. In § 2 there is a provision for reaching the same result by issuing preferred shares of stock of the West End Company and delivering them in exchange for shares of one of these other corporations on terms agreed upon, and depositing the shares received from the other corporation with a trust company in Boston, until all the shares of the other company have been received, and then cancelling them. In this case, as in the last, the West End Company acquires all locations, rights, powers, privileges and franchises of the other company, and becomes subject to all its duties, restrictions and liabilities. By either of these three methods the new consolidated company, or the purchasing company, or the West End Street Railway Company after delivering its stock, stands in the place of the company whose property and franchises have been acquired.

In § 1 is this provision: "But such leases, purchases, sales and consolidations shall be only upon such terms and conditions as shall be agreed upon in the first instance by the directors and then by a majority in interest of the stockholders of each cor-

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poration called for that purpose and approved by the board of railroad commissioners."

The second section is inapplicable to this case, for the stock of the Malden and Melrose Company was not acquired by giving shares of the preferred stock of the West End Company in exchange for it. The master has found that there was no consolidation, that is, that there was no formation of a new corporation under the statute. But he has also found that the West End Company reported to the railroad commissioners that it "owned the stock and property of the Malden and Melrose Company — all of it — and would like to have the Malden and Melrose report omitted." Here is an admission of the company, made many years ago, which shows that the condition is such as that referred to in § 1 of this statute, when the entire property, rights and franchises of one of these corporations has been acquired by another of them. The admission does not state in terms that the mode of acquisition was exactly that prescribed in the statute. The required approval by the railroad commissioners of the terms and conditions upon which this result was reached is found, by implication, in their report, in which they struck the Malden and Melrose Company from their lists, with this explanation: "The Malden and Melrose having been merged in the West End by the purchase of all its capital stock and assets," etc. Since then, this corporation, with all that pertained to it, has been treated by the railroad commissioners as belonging to the West End Company. The latter corporation, for more than twenty years, has treated the property formerly of the Malden and Melrose Company as its own, has acquired new locations in its own name, in place of other locations originally granted to the Malden and Melrose Company, while most of these locations originally so granted have been revoked, some of them on the petition of the West End Company. The Malden and Melrose Company has known of this admission, and of all that has been done by the other company in reference to its property and interests, and seemingly has acquiesced in it.

The most difficult question in the case is whether the acquisition of the entire property, rights and franchises of the Malden and Melrose Company by the other defendant is to be deemed a purchase, upon terms and conditions agreed upon in the first in-

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stance by the directors and then by a majority in interest at a meeting of the stockholders of each corporation held for the purpose. As we have said, the approval of the railroad commissioners sufficiently appears. There is no reported evidence or finding bearing directly upon the way in which the business was accomplished. It is found that the stock of the Malden and Melrose Company, which was held at the time by the president of the Middlesex Railroad Company and afterwards by the president of the West End Company, was transferred to the latter corporation and paid for by it. This purchase seems to have covered most of the capital stock of the company. How or when other stock or property was procured does not appear.

It is fair to infer that this business was done lawfully, by an agreement of the directors of the two companies, and was confirmed by corporate action. Indeed, the only way in which it could be legally done was under this statute, and in accordance with its terms. Apart from this statute, the West End Company had no right to buy and hold the stock of another street railway company. Pub. Sts. c. 113, § 18. As it could not become the owner of the "stock and property of the Malden and Melrose Company — all of it," except by a purchase of the kind stated in the statute, it is not to be assumed, from a mere failure to present evidence of the particulars of the action, that the acquisition of this stock and property was unlawful, and that all the action of the West End Company for more than twenty years in reference to the property has been contrary to law. There is a similar and perhaps stronger inference to be drawn from the action of the railroad commissioners. As an official board, supervising the conduct of all the street railway companies in the Commonwealth, it knew the law applicable to such companies, and it became satisfied that the West End Company had lawfully acquired all the stock and property of the Malden and Melrose Company. Presumably, this was upon a presentation of evidence that this property had been purchased under the St. 1887, c. 413, upon terms and conditions agreed upon by the directors of each of the two companies and afterwards by a majority of the stockholders of each company, at meetings called for the purpose. In the absence of evidence to the contrary, there

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is always a presumption that the action of such a corporation is lawful, and still more is there such a presumption in regard to the official action of a board of public officers.

There is nothing in the statute to indicate that such a purchase might not lawfully include the buying of the stock of the corporation whose franchises and property are to be acquired. Indeed, under the second section the union and transfer are accomplished entirely by an acquisition of stock through an exchange of preferred shares of the West End Company for the stock of the other company. It was the purpose of the Legislature that, upon the giving up of its property and franchises in either of the three ways, whether by an exchange of shares under § 2, or by a formal consolidation under § 1, or by a sale and purchase of the entire property, rights and franchises under § 1, the creditors of the selling or consolidated corporations should be protected by obtaining a substituted liability of the new consolidated company, or of the purchasing company. In the present case the West End Company evidently sought to acquire by purchase all the property and valuable rights and interests of the Malden and Melrose Company. It did that which its officers deemed necessary to obtain these under the statute. For more than twenty years it has held and used all the franchises and property of the other corporation as its own. It intended to put itself in a position to have all the advantages which the statute permitted it to obtain, by a purchase in the manner prescribed. That it was ignorant of the existence of these judgments against the Malden and Melrose Company, which had been recovered many years before and which were afterwards renewed by suits, is immaterial to the rights of this plaintiff. These rights are protected by the statute which says that a corporation acquiring such property and franchises of another corporation shall be subject to its liabilities. Having availed itself of the privileges conferred by the statute, this defendant cannot complain because it is held to the accompanying liabilities. Nor should it object to the drawing of inferences from its declarations and public acts, on which the legality of its corporate conduct in reference to the other corporation depend. Nothing less than strong proof of the negative would justify a conclusion that these two corpora-

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tions and their officers failed to heed the requirements of the statute in this important matter.

We understand the master's finding of an admission "by the plaintiff that the statutory requirements for the consolidation had not been complied with" to mean an admission that the requirements for the statutory consolidation mentioned in § 1 had not been complied with, and not an admission that there had not been a union, or a virtual consolidation through the complete ownership of one corporation by the other, obtained in a lawful way.

The master also found that "after the agreement of 1862 the former company (the Malden and Melrose Company) took no corporate action except for the choice of officers." We are not certain whether this is intended to cover the period after the enactment of the St. 1887, c. 413; but if it is so intended, it does not indicate that the directors did not agree to the terms and conditions of a purchase by the West End Company which should give complete ownership and control of the entire property, rights and franchises of the corporation. It is found that the officers of the corporation made reports to the railroad commissioners for many years after 1862, and presumably they took other action as officers.

If the finding means that this company never agreed to the purchase by the West End Company at a meeting of the stockholders called for the purpose, we are inclined to hold that this provision of the statute is for the protection of the stockholders, and when the purchaser of all the property and capital stock of the company has for more than twenty years treated this as a valid purchase, and acted upon it, with its acquiescence, that the corporation cannot now set up its non-compliance with this provision against the validity of the change of ownership. Especially should this be so held when the corporation and its managers, in pursuance of the arrangement, have permitted the use of its property to be enjoyed by the purchasing corporation, and its earnings to be so mingled with the earnings of the purchasing company that it is impossible to follow them. The effect of this conduct of the managing officers of both corporations, and of the corporations themselves, has been to put the earnings of the Malden and Melrose Company beyond the reach of creditors,

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through the union of the two corporations. Both corporations should now be estopped to deny that the statutory requirements were complied with and that there was a complete union by purchase, such as was contemplated by the statute. There has been a virtual merger of the two corporations, acquiesced in for a long time by everybody interested. It has often been held that non-compliance with similar statutory provisions, made for the benefit of a corporation, cannot be set up against third persons, when those for whose protection they were intended have acquired advantages through action in disregard of them. *Chicago, Santa Fe & California Railroad* v. *Ashling*, 160 Ill. 373. *Chicago & Joliet Electric Railroad* v. *Ferguson*, 106 Ill. App. 356. *Williamson* v. *New Jersey Southern Railroad*, 11 C. E. Green, 398. *St. Louis, Vandalia & Terre Haute Railroad* v. *Terre Haute & Indianapolis Railroad*, 145 U. S. 393. *Phinizy* v. *Augusta & Knoxville Railroad*, 62 Fed. Rep. 678. See *Hatch* v. *Hawkes*, 126 Mass. 177; *Spaulding* v. *Arlington*, 126 Mass. 492, 494; *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365, 377. We are of opinion that both corporations have been so conducted, in reference to the ownership of the Malden and Melrose Company and of its property, rights, and franchises, especially in reference to the income from the use of its property, that, as against creditors of that company who are left with nothing from which to satisfy their debts, they are estopped to deny the regularity of their proceedings and the completeness of a union by purchase, such as the statute refers to. It follows that the West End Company became subject to the liabilities of the other defendant, including the liability now represented by the plaintiff's judgments.

The statement in the tenth paragraph of the bill is broad enough to include a union of the West End Company with the Malden and Melrose Company by the purchase of its entire property, rights and franchises, and therefore an assumption of its liabilities under this statute, and a consolidation in fact, although there was not a formal and technical consolidation by the creation of a new corporation. The exception to the twenty-fourth finding of the master is therefore sustained, not because of the statement that there was no technical consolidation, within the meaning of the word as used in the statute, but because

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the finding seems to include a union and consolidation in fact, through a purchase of the entire property, rights and franchises of the other corporation, in such a way as to make it subject to the liabilities of that corporation, under the statute.

The twenty-fifth finding is not fatal to the plaintiff's claim to recover for a direct liability of the West End Company under the statute. So far as it purports to conclude that, upon the facts, either with or without an amendment, the bill cannot be maintained, the plaintiff's exception to it is sustained.

The exception to the twenty-sixth finding is overruled. The grounds of objection on which the exception is founded are not applicable. The mere fact that the West End Company has taken possession of all the assets of the Malden and Melrose Company does not create a liability to the plaintiff. If creditors might follow the assets in equity, this finding has no relation to that subject. Whether the legal proposition stated in this finding can be availed of by the defendant at this stage of the case is a question which is not definitely presented by the report of the single justice. We treat it as a question of law that can be considered apart from the exception.

In reference to the questions intended to be presented by the report of the single justice, we are of opinion that the tenth exception of the defendants to the master's report on recommittal does not require consideration.* We overrule it as immaterial in the present aspect of the case, without prejudice to the right of the respondents to have it considered further if it becomes important hereafter.

Exceptions to the twenty-fourth and twenty-fifth findings sustained; case to stand for further hearing.

* This exception was "to the failure of the master to find that in February, 1870, the Middlesex Railroad Company had acquired from the Suburban Railroad Company (formerly the Cliftondale Railroad Company) the right to enter upon and use the tracks of the Malden and Melrose Railroad Company in such mode as might be agreed upon."

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JANE C. MANSFIELD *vs.* HENRY W. TENNEY & others, trustees.

Suffolk. March 19, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Trespass, To real estate. *Judgment. Damages*, In tort. *Nuisance. Real Action.*

In an action for trespass upon a strip of land belonging to the plaintiff by constructing upon it a part of the foundation supporting a wall of the building upon the adjoining lot on a city street, it appeared that about three years before the date of the writ the plaintiff brought an action for the same trespass, in which the presiding judge instructed the jury to take as the measure of damages the diminished value of the plaintiff's property, whereupon the jury returned a verdict for the plaintiff in a substantial sum, for which judgment was entered, and the amount was paid in full by the defendant and was received by the plaintiff. It further appeared that since the judgment in the previous action there had been no trespass other than the maintenance of the same wall upon the plaintiff's land. Although the case was disposed of on another ground, it was intimated that the previous judgment and its satisfaction must be a bar to this action, as the plaintiff had received full compensation for all the injury done to his property by the act of the defendant in going upon his land and erecting there this permanent structure.

If an owner of land upon a city street constructs a wall which encroaches upon the adjoining land, and the owner of the strip of land thus unlawfully built upon brings a writ of entry, in which he recovers judgment for the possession of the land on which the trespass was committed, he cannot afterwards maintain an action against the trespasser for an alleged nuisance in continuing the maintenance of the wall, because the part of the wall on the plaintiff's land belongs to him and the defendant has no right to remove it.

If an owner of land on a city street brings a writ of entry to obtain possession of a strip of land on which the owner of the adjoining lot has constructed a part of a wall, and obtains a judgment for possession and costs, on which he takes out an execution, which is returned into court when the costs have been paid by the tenant, and the demandant in his writ has set forth no claim for damages and none are awarded to him, *whether* this judgment is a bar to an action for trespass subsequently brought by the demandant in the writ of entry against the same person to recover damages for injury to his property from having the wall upon it, on the ground that full damages might have been recovered in the writ of entry under R. L. c. 179, §§ 12–16, 42, here was not considered because the facts made it immaterial.

TORT in the nature of trespass *quare clausum fregit* to recover damages for unlawfully entering a strip of land belonging to the plaintiff and building upon such land a part of a stone founda-

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tion with a brick wall thereon six stories in height. Writ in the Municipal Court of the City of Boston dated March 8, 1904.

On appeal to the Superior Court the case was tried before *DeCourcy*, J. The evidence tended to show that in the year 1892 the defendants erected a six story brick building with a brick wall sixteen inches thick upon granite foundations adjoining the plaintiff's estate and facing on Columbus Avenue in Boston; that the defendants' foundations encroached upon the plaintiff's property; that this encroachment was not intentional; that a writ of entry was brought by the plaintiff for the possession of the land so encroached upon, which was dated March 20, 1899; that on January 29, 1901, a finding was rendered for the demandant in that action, who was the plaintiff in the present action, for the same strip of land with the same boundaries set forth in this action; that the demandant in the writ of entry set forth no claim for damages, and none were awarded, and the defendants in the present action, the tenants in the writ of entry, made no claim for improvements and were awarded none; that execution for possession was issued on March 7, 1901; that no proceedings were taken under it further than that the tenants paid the costs and the execution was returned into court; that on February 28, 1901, the plaintiff brought an action for trespass against the defendants which was tried at the October sitting of 1903. In that action the jury returned a verdict for the plaintiff in the sum of $552.93. Judgment was entered on the verdict and execution was issued thereon. The defendants paid to the plaintiff the amount of the execution and it was returned into court and was discharged.

The defendants having made no change in the condition of the wall, the plaintiff brought the present action. The pleadings and records in the writ of entry and the first action of trespass were put in evidence, and also the charge of the judge in the first action of trespass, directing the jury to take as the measure of damages the diminished value of the plaintiff's property.

The judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

J. T. Wilson, for the plaintiff, submitted a brief.

A. H. Russell, for the defendants.

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SHELDON, J. The previous action of trespass between these parties was submitted to the jury under instructions directing them to take as a measure of damages the diminished value of the plaintiff's estate, and to return their verdict for that sum with interest up to the date of the trial. Although each party took some exceptions to the rulings made by the judge who presided at that trial, yet none of these were prosecuted. The jury returned a verdict for a substantial sum, judgment was entered thereon, with the acquiescence of both parties, and the amount of that judgment was paid in full by the defendants and received by the plaintiff. There has been no other or further trespass since then, except the maintenance of the same wall upon the plaintiff's land, in the same condition in which it then was. It must be presumed, of course, that the verdict was rendered in accordance with the directions given by the presiding judge to the jury. Accordingly the plaintiff has received full compensation for all the injury done to her estate by the act of the defendants in going upon her land and erecting this permanent structure. *Dickinson* v. *Boyle*, 17 Pick. 78. Under those circumstances it is difficult to see how she can have any further compensation. *Fowle* v. *New Haven & Northampton Co.* 107 Mass. 352, and 112 Mass. 334.

The plaintiff however contends that this is a nuisance created by the defendant, and that she is entitled as a matter of right to damages for its maintenance, regardless of what compensation she may have received in the past. But this argument overlooks the facts of the case. Not only has she received full compensation for the wrong done to her by the defendants, but she has recovered in a writ of entry judgment for the possession of the land upon which the trespass was committed, and this of course carried with it the right to the wall which stands upon that land. The defendants since then have not had the right to remove that portion of the wall. To do so would be to commit a new trespass by entering upon her land and tearing down a structure which belongs to her and with which the defendants have no right to meddle. *Cavanagh* v. *Durgin*, 156 Mass. 466, 470. This is not an erection upon the defendants' own land, which they have a right to remove and ought to remove because it is a nuisance to the plaintiff. *Aldworth* v. *Lynn*, 158 Mass. 58,

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56. *Wells* v. *New Haven & Northampton Co.* 151 Mass. 46, 50. In *Mears* v. *Dole*, 185 Mass. 508, the plaintiff was allowed only such damages as he could not have recovered in his former action.

We need not consider whether under the provisions of R. L. c. 179, §§ 12–16, and 42, the plaintiff should not have recovered her full damages in her writ of entry, or whether the effect of the judgment entered upon that writ was to bar either her present claim or that made in her former action of tort for trespass. *Raymond* v. *Andrews*, 6 Cush. 265. *Stark* v. *Coffin*, 105 Mass. 328, 332.

The verdict for the defendants was rightly ordered.

Exceptions overruled.

ALTHEA A. FARRINGTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 19, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way, Defect in highway. *Negligence. Street Railway.*

Where a city street, paved with asphalt, has a reserved space in the centre twenty-five feet wide, which was laid out as a part of the street "for the use of street railways and for grass" and is so used, and this reserved space is a few inches above the level of the street at either side and is bounded by a granite curbing seven inches wide, and at the intersections of cross streets there are cross overs paved with stone, for the passage of teams, of the same level as the reserved space, a curved corner stone which is the termination of the curbstone at one of these cross overs, three inches higher than the asphalt surface of the street where it starts from the straight curbing of the reserved space, two and a quarter inches above the asphalt at another point nearer a rail of the tracks of a street railway, and one and three quarter inches higher than the asphalt at the place where the asphalt and the paving of the cross over come together, if it has no imperfection and is constructed and laid in the usual manner, cannot be found to be a defect in the highway, and if a woman passenger in an open electric car, in alighting at night from the running board opposite the fourth seat from the rear of the car, steps on such a corner curbstone and turns her ankle, she cannot recover against the corporation operating the car for her injuries thus caused, because the stopping of the car for her to alight at such a place is no evidence of negligence.

TORT for personal injuries alleged to have been incurred when alighting from a car of the defendant in which the plaintiff was

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a passenger, at the time and place and in the manner described in the opinion. * Writ dated November 18, 1905.

In the Superior Court the case was tried before *Bishop*, J. The facts shown by the evidence are stated in the opinion. At the close of the evidence the defendant asked for certain rulings and instructions, of which the first was that upon all the evidence the plaintiff could not recover, the second was that upon all the evidence the plaintiff was not in the exercise of due care, and the third was that upon all the evidence the defendant was not negligent. The judge refused to make these and other rulings requested by the defendant, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $1,500. The defendant excepted to the refusals and to the instructions given.

The judge reported the case for determination by this court. If either of the defendant's requests numbered 1, 2 or 3 should have been given, judgment was to be entered for the defendant; otherwise, judgment was to be entered upon the verdict.

F. H. Chase, (*R. M. Bowen* with him,) for the defendant.

S. J. Elder, (*C. A. Barnes* with him,) for the plaintiff.

HAMMOND, J. This is an action to recover for injuries sustained by the plaintiff in alighting from one of the defendant's open cars at 8.45 in the evening of July 28, 1905, at or nearly opposite the intersection of Garrison Street with Huntington Avenue in Boston. Through this part of the avenue there is a reserved space twenty-five feet wide (including curbstones) which was laid out in 1894 as a part of the avenue, "for the use of street railways and for grass." This reserved space is a few inches above the level of the street on either side, and is bounded with granite curbing seven inches wide set three feet and six inches from the inside or gauge line of the rail. At the intersection of the various cross streets and opposite Garrison Street are paved "cross overs" for teams, higher than the asphalt surface of Huntington Avenue. The curbstones above mentioned terminate at these "cross overs" in curved corner granite blocks which turn inwards towards the rails and come within seven inches of the nearest rail. The corner block nearly opposite the northerly sidewalk of Garrison Street, being the block upon which the plaintiff testified she stepped

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on alighting from the car, was three inches higher than the asphalt surface of Huntington Avenue next to the straight curbing of the reserved space, two and a quarter inches above the asphalt at another point nearer the rail, and one and three quarter inches higher than the asphalt at the place where the asphalt and paving came together, which point was a little less than two feet from the rail. These differences in the height of the top surface of the granite block above the surface of the street we understand are not caused by any unevenness in the surface of the stone, but by the gradual ascent of the crossing as it goes toward the rails of the defendant.

The avenue and cross over, including the granite curbing, were constructed by the city of Boston, upon which municipality rests the duty of keeping the streets in repair. The physical condition had not changed from the time of the construction up to the time of the accident. There is no evidence that there was any imperfection in the work itself. It was just exactly what it appeared to be. No contention was made that it was not in good repair.

As to the accident the plaintiff testified that she and a friend were seated upon the fourth seat from the rear of the car, she being at the left of her friend who was at the right hand end of the seat; that as the car approached Garrison Street she signalled to the conductor, who rang the bell and the car came to a full stop. "She stepped past her friend, down upon the running board with both feet, and holding to the forward grab rail by her left hand, stepped down with her right foot to the ground, as she supposed, and when her toe struck the ground she let go her hold and her foot slipped and turned over, and she fell to the ground and broke her leg." She further testified that "after her fall she was right close to the car, so that she could touch the running board with her hand; that she was helped up and to the nearest corner of Garrison Street and then looked back, and for the first time noticed that the rear of the car projected out into the paved cross over for teams." On cross-examination she testified that "the car had arrived at Garrison Street and that she was at Garrison Street where she wanted to stop, but she did not notice particularly where the car had stopped, or that it had not gone far enough along, and that

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she supposed it had stopped where it always did; that she looked down as she stepped off, but that the car was brilliantly lighted and she could not see the ground and supposed the car was at the brick crosswalk; that she should judge, looking at the plan, that her foot landed at about the middle of the curved block, on the edge; that when she stepped down she stepped out some inches beyond the running board to clear it, as one naturally would do; that as she alighted her heel slipped off the curb, which turned her ankle, and she fell. That during all this time the car was stopped still, the conductor being on the rear platform; that there were very few people in the car; that there was no crowding or pushing, or anything to hurry her. That she did not notice the exact position of the car until after she had reached the sidewalk and looked back."

The evidence was conflicting both as to where the car stopped and as to where the plaintiff stepped as she alighted. Several witnesses for the defendant testified that the plaintiff stepped on the brick crosswalk, which had been constructed by the defendant within the reserved space, a few feet from the paved cross over, and that she safely reached the walk and received her injury after she had fully alighted. But the jury had the right to accept as true the account given by the plaintiff.

"No contention was made that the plaintiff could recover against the defendant on account of any dangerous condition in the reservation, curbstone or street other than the corner block itself, and her counsel stated to the jury that he made no such claim, and admitted that if the plaintiff had safely alighted from the car and afterwards tripped on the straight curbstone or other obstruction she could not recover."

The presiding judge refused to rule, as requested by the defendant, that upon all the evidence the defendant was not negligent, and submitted that question to the jury, with instructions that "if the plaintiff satisfied them that the accident occurred at the point at which she claimed it did, and [they] were satisfied that the place was a dangerous one to alight upon and amounted to a defect in the highway; and that the defendant knew that it was a dangerous place, or by the exercise of reasonable care might have known that it was so, and yet stopped its car there

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in such a way as to amount to an invitation to the plaintiff to alight there, then she might recover."

We are of opinion that a jury ought not to be allowed to find this corner stone, taken in connection with its surroundings, to be a defect in the highway. It is a very common construction where a sidewalk, or any other reservation elevated as this was above the rest of the street, is crossed by a street or way, public or private. In the construction of a street it is good workmanship to have the sidewalk raised above that part of the surface of the street which lies next to the sidewalk, and speaking generally such a method of constructing a sidewalk is almost universal. There must be some way of getting from one level to the other, when the continuity of the sidewalk or raised reservation is interrupted by cross streets; and the way adopted here is and for generations has been one of almost universal use. Upon the evidence it must be held as matter of law that the way was not defective. *Burke* v. *Haverhill*, 187 Mass. 65, and cases cited. Compare also *Raymond* v. *Lowell*, 6 Cush. 524, 532, 533.

Nor is there any evidence of the negligence of the defendant. The car was stopped so that the plaintiff in alighting stepped upon a spot properly worked for public travel. It is to be noted that the street is in no sense a passenger station for the safety of which the defendant is responsible. The defendant had nothing to do with the construction of the street at the spot upon which the plaintiff testified she stepped. As a rule its duty, so far as material to the question under discussion, is met when it stops its car so that the passenger in alighting steps upon a part of the street properly worked for public travel. And such seems to have been the view of the presiding judge, for he instructed the jury that in order to bring in a verdict for the plaintiff they must find among other things not only that the place where the plaintiff alighted was dangerous but that it "amounted to a defect in the highway." This is not a case where by reason of changes in the surface of the street while undergoing repairs, or from some other cause, the street is temporarily defective and a passenger in alighting is likely to step on the defect. In such a case the defendant may be held to reasonable care, either by way of warning or otherwise, to see

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that the passenger safely alights. There was nothing in the appearance of the plaintiff to indicate to the conductor that she had not the ordinary capacity to care for herself, or that it would be any more dangerous for her to alight than for any other person. The defendant had the right to assume that the plaintiff knew generally of the construction of sidewalks. There was no greater difference between the surface of this stone above the asphalt at the place upon which the plaintiff alighted than may occur between the level of two cobble stones. The injuries to the plaintiff were the result of turning her ankle. To require a street railway company to make so minute an examination of a properly worked street as a decision for the plaintiff in this case would call for, would be to impose upon the defendant a burden at once unreasonable and practically impossible of performance.

It follows that the first and third requests should have been given; and therefore, in accordance with the terms of the report, there is to be

Judgment for the defendant.

POSTAL TELEGRAPH-CABLE COMPANY *vs.* CITY OF WORCESTER.

Suffolk. March 19, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations. Public Officer. Worcester. Wires. Equity Pleading and Practice, Amendment, Terms of reservation, Parties.

Under St. 1902, c. 372, providing in § 1 that the city council of the city of Worcester may by ordinance designate some officer or officers of the city who shall have exclusive authority to cause all telephone, telegraph and certain other wires to be removed from the streets and placed underground, and in § 7 making the mayor and aldermen of the city a board of appeal for persons aggrieved by any act or decision of such officer or officers, such officers, when thus designated by ordinance, are public officers of the Commonwealth and are not agents of the city, and the mayor and aldermen, when acting as a board of appeal under the statute, are not agents of the city but act as a *quasi* judicial board of officers.

A suit in equity cannot be maintained against the city of Worcester to enjoin it from causing certain telegraph wires to be placed underground by authority of the provisions of St. 1902, c. 372, as the city of Worcester has no power to enforce the provisions of that statute.

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Where a suit in equity was brought against a city relating to a matter in which certain public officers had exclusive jurisdiction, and the bill was dismissed by a single justice of this court who reported the case for determination by the full court, with the reservation that if the ruling of the single justice was correct, the bill was to be dismissed, otherwise, that such order or decree was to be entered as justice required, the counsel for the plaintiff suggested at the argument before the full court, that if the suit was brought against the wrong party, the terms of the report should be disregarded and the plaintiff should be allowed to amend his bill before a single justice. This suggestion first was made in a supplemental brief of the plaintiff after the defendant's brief had been filed. *Held*, that the terms of the report should be followed, and that the bill should be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court on August 18 and amended on November 25, 1908, by the Postal Telegraph-Cable Company of Massachusetts, a corporation organized under the laws of this Commonwealth, against the city of Worcester, to enjoin the defendant from compelling the plaintiff under the provisions of St. 1902, c. 372, to remove its line of telegraph from its present location in a certain district of that city and to place it underground.

The case came on to be heard before *Sheldon*, J. The plaintiff read the pleadings and a statement of certain facts which were agreed to by the parties. The plaintiff then offered evidence in support of the allegations of its bill. Thereupon the defendant contended that upon the allegations of the bill and the facts agreed upon the bill could not be maintained, and moved that it be dismissed.

In response to an inquiry of the justice as to whether the defendant rested its case, the defendant stated that it did. The justice thereupon refused to permit the plaintiff to put in evidence in support of the allegations of its bill, and ruled that upon those allegations, and the facts as agreed upon, the bill could not be maintained, and ordered that the bill be dismissed. He reported the case for determination by the full court. If the ruling of the single justice was correct, the bill was to be dismissed; otherwise, such order or decree was to be entered as, under the circumstances, the law required.

G. P. Wardner, (*C. H. Walker* with him,) for the plaintiff.

E. H. Vaughan, for the defendant, submitted a brief.

KNOWLTON, C. J. By the St. 1902, c. 372, provision is made for the removal of wires and electrical appliances from the public

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streets in the central portion of the city of Worcester. The act authorizes a designation by ordinance of an officer or officers of the city, who are given full power and authority and are directly required by the statute to carry out the provisions under which these wires and appliances are to be removed from the streets, and placed underground. The city itself is not authorized to take any action in regard to the removal of any of these wires or appliances, other than to designate by ordinance the officer or officers that the statute calls for. These officers, when designated, are public officers, who derive their power and authority from the statute, and are not subject to direction or control by the city in any way. They represent the Commonwealth, for the public good. The city is not responsible for their acts nor liable for their omissions. There is a long list of decisions in which this doctrine, in its application to similar officers, has been established and maintained by this court. *McGinnis* v. *Medway*, 176 Mass. 67. *Dunbar* v. *Boston*, 112 Mass. 75. *Buttrick* v. *Lowell*, 1 Allen, 172. *Kimball* v. *Boston*, 1 Allen, 417. *Rossire* v. *Boston*, 4 Allen, 57. *Tindley* v. *Salem*, 137 Mass. 171, 174. *McCarthy* v. *Boston*, 135 Mass. 197, 200. It is not material that the designation of the officers is required to be by city ordinance. In *Fisher* v. *Boston*, 104 Mass. 87, 93, Mr. Justice Gray said: "It makes no difference whether the Legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." This is even more plainly true of the officers acting under the statute before us.

It is not material on this point that there is a right of appeal from these officers to the mayor and aldermen. The mayor and aldermen, in dealing with such an appeal, would not be the agents of the city, but would act as a *quasi* judicial board of officers, as they do in most cities in laying out streets and sewers and in the performance of some other public duties.

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The suit before us is a bill in equity to obtain an injunction against the city of Worcester, to restrain it "from enforcing or endeavoring to enforce . . . the provisions of chapter 372 of the Acts of 1902," etc. A board of officers has been designated by ordinance by the city council of Worcester, in accordance with the terms of the statute. Upon the presentation of an agreed statement of facts and an offer of other evidence by the plaintiff, the single justice ruled that, upon this statement and the offer of evidence, the bill could not be maintained, and he reported the case to the full court. If the ruling was correct, the bill was to be dismissed; otherwise, such order or decree was to be entered as the law required. The city of Worcester has no power to enforce the provisions of this statute, or to compel the plaintiff to remove its line of telegraph wires from its present location in the city, and place it or any portion of it underground. For the reasons stated above, the city is not a proper party to a proceeding for such relief as the plaintiff seeks. The ruling was correct and the bill must be dismissed.

Many other questions of law have been raised and argued by the parties, which we have no occasion to consider. It does not appear on what ground the ruling was made by the single justice, nor is it important to know. It may have been made upon different grounds. The plaintiff's counsel suggests that, if the suit is brought against the wrong party, the terms of the report should be disregarded and the report discharged, and the plaintiff be given an opportunity to amend before a single justice. This suggestion was not made until after the defendant's brief had been filed, and it first appears in the plaintiff's supplemental brief. We are of opinion that the terms of the report should be followed. A decision in this case will not affect the rights of the parties in a suit brought against other defendants, and, if an amendment were allowed in this case, no progress could be made against such defendants without giving them an opportunity to be heard, as upon the filing of a new bill.

Bill dismissed.

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EDITH E. EATON *vs.* CLIFFORD M. LOCKE.

Norfolk. March 19, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way. Nuisance.

A person whose land is injured by the obstruction of a public way by a fence, which is not in the part of the way against which his land abuts, and who shows no damage differing in kind from that suffered by the general public, cannot maintain a suit in equity to enjoin the maintenance of the fence.

BILL IN EQUITY, filed in the Superior Court on July 9, 1908, by the owner of a lot of land with a building thereon in Needham, where the husband of the plaintiff carried on the undertaking and livery business, to enjoin the defendant from maintaining a fence constructed by him across a road or way running from the plaintiff's building across the land of the defendant to a public highway called Great Plain Avenue.

In the Superior Court the case was heard by *Richardson*, J., upon a master's report and the exceptions thereto. He made a final decree that the bill be dismissed, and the plaintiff appealed.

J. H. Soliday, (*H. P. L. Partridge* with him,) for the plaintiff.

E. N. Carpenter, for the defendant.

HAMMOND, J. This is a bill in equity setting out that in violation of the plaintiff's rights the defendant has constructed a fence across a certain road or way, and praying that he may be enjoined from interfering with her use of the way. In the bill the plaintiff alleges that by an adverse user she has acquired by prescription a private right to use the way free from obstruction; and she alleges also that the public has gained by prescription a similar right. In other words, she bases her prayer for relief both upon her private right and her right as one of the public in the exercise of the public right.

It appears by the record that at the hearing before the master the plaintiff abandoned all claim of right in the way as an individual, and relied wholly upon her interest in the public right. Upon this issue the master found that the plaintiff had acquired

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"individually and collectively," as one of the general public, the right to use the way. It is agreed that this finding has reference only "to her right acquired as one of the public, and not as a private individual." Under these circumstances this bill stands as a bill for relief for injury suffered by the plaintiff by the obstruction of a public right of way.

It is well settled that a person cannot maintain an action for the obstruction of a public highway, unless he proves that he has sustained some special and peculiar damages different in kind, and not merely in degree, from that suffered by other persons from the alleged nuisance. *Willard* v. *Cambridge*, 3 Allen, 574, and cases cited. This is only a corollary of the general proposition that an individual cannot maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public. The only remedy is by indictment or other public prosecution. *Brayton* v. *Fall River*, 113 Mass. 218, 227. The subject has been so recently treated in *Robinson* v. *Brown*, 182 Mass. 266, that it is necessary only to refer to that case and the cases therein cited, to show the existence and reason of the rule. The obstruction was not in that part of the highway against which the land of the plaintiff abutted, and she has shown no damage differing in kind from that suffered by the general public. *Brayton* v. *Fall River*, *ubi supra*. *French* v. *Connecticut River Lumber Co.* 145 Mass. 261, 264. *Robinson* v. *Brown*, 182 Mass. 266, and cases cited.

The plaintiff contends that even if this is so the defendant should have taken the objection earlier, and that having gone without objection to a hearing before the master, it is now too late for him to object to the jurisdiction of the court upon the ground that there is a complete and adequate remedy at law. And in support of that proposition she cites *Driscoll* v. *Smith*, 184 Mass. 221, and many other cases.

But the plaintiff entirely misapprehends the nature of the defendant's contention and the ground upon which the bill was dismissed. The defense did not deny the jurisdiction of the court in equity on the ground that the plaintiff had a complete remedy by private action, or on any other ground. The bill was not dismissed for want of jurisdiction; on the contrary, it was dismissed because the court, having jurisdiction and acting

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within it, determined that no private right of the plaintiff under the circumstances disclosed by the evidence had been invaded. In other words, the bill was dismissed not upon the ground that the plaintiff's claim should be adjudicated only in a private action at law, but upon the ground that she had shown no cause of private action at all. The plaintiff showed no violation of any private right nor any special and peculiar damage for the violation of her right as one of the public. *Driscoll* v. *Smith*, 184 Mass. 221, cited by the plaintiff was a case concerning a private way.

Decree affirmed with costs.

GEORGE H. SAMPSON COMPANY *vs.* COMMONWEALTH & others.
ALBERT A. HERSEY *vs.* SAME.

Suffolk. March 22, 23, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Commonwealth. Equity Jurisdiction, To enforce bond given under Pub. Sts. c. 16, § 64, or R. L. c. 6, § 77. *Bond. Surety. Lien. Equity Pleading and Practice*, Findings of master. *Interest. Words*, "Completion of the work."

Under the various sections of Pub. Sts. c. 195, and St. 1887, c. 246, one who has furnished labor and materials used in the construction of public works under a contract with the Commonwealth, where the contractor in compliance with the requirement of Pub. Sts. c. 16, § 64, has given a bond to secure the payment by the contractor and by all sub-contractors for all labor performed or furnished and for all materials used in such construction, can obtain an enforcement of the liability of the surety on the bond for the payment of the contractor's debt to him in a suit in equity in which the contractor, the Commonwealth and the surety on the bond are made defendants.

In a suit in equity to obtain the enforcement of a bond given in compliance with the requirement of Pub. Sts. c. 16, § 64, by a contractor who had a contract with the Commonwealth for the construction of a public aqueduct, to secure the payment "for all labor performed or furnished and for all materials used in such construction," gunpowder used in blasting rock to excavate a trench for the aqueduct and to put the rock in condition for use in the construction of the aqueduct comes within the provision of the statute as a material "used in such construction," in payment for which the plaintiff is entitled to have the liability of the surety on the bond enforced.

In a suit in equity to obtain the enforcement of a bond given in compliance with the requirement of R. L. c. 6, § 77, by a contractor who had a contract with

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the Commonwealth for the construction of a public sewer, to secure the payment "for labor performed or furnished and for materials used in such construction," piles, furnished and put in position as a part of the completed structure of the sewer and designed for its support, and the labor furnished in putting them in position by means of a pile driver are labor and materials used in the construction of the sewer within the meaning of the statute, for which the plaintiff is entitled to have the liability of the surety on the bond enforced, and the fact that the plaintiff's laborers used the pile driver does not deprive him of his lien for their labor.

In a suit in equity a finding of a master may be found to have been warranted by the evidence, although the evidence is very indefinite and depends largely upon circumstances and inferences that do not approach very near to absolute certainty.

Under the provision of R. L. c. 6, § 77, that "officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents, a sworn statement of his claim, within sixty days after the completion of the work," the "completion of the work" from which the period of sixty days is to be reckoned is the completion of the public work for the construction of which the contract was made, and the section does not require the filing of a statement of each claim for labor or materials within sixty days after the last of such labor or materials is furnished by the claimant.

Under the provision of R. L. c. 6, § 77, that "officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair," the materials referred to are those that enter directly into the work and become a part of it, or those that are consumed by being applied directly to substances to be moved or changed to make a place for the structure or to be incorporated into it, and the provision does not extend to a claim for coal burned in engines which were used on the work to furnish power for different purposes.

In a suit in equity to enforce the liability of the surety on a bond given under the requirement of R. L. c. 6, § 77, as security for the payment by a contractor for labor performed or furnished and for materials used in the construction of a public work under a contract with the Commonwealth, it appeared that some of the claimants had accepted notes, payable upon short terms of time, to enable them to raise money for necessary uses, and a master found that these notes were not accepted as payment but were taken for a temporary purpose. There was no evidence of any loss to the surety by these arrangements. The surety contended that it was discharged from its liability for these claims by the giving of time to the debtors. *Held*, that a bond given under the statute is an agreement to make good all deficiencies if the contractor fails to make his payments within a reasonable time, and that under such a contract any reasonable arrangement in regard to payments made by persons not mentioned in the bond should not release the surety unless the arrangement is prejudicial to him; so that the surety here was not discharged from its liability.

In a suit in equity to enforce the liability of the surety on a bond given under the requirement of R. L. c. 6, § 77, as security for the payment by a contractor for

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labor performed or furnished and for materials used in the construction of a public work under a contract with the Commonwealth, the claimants are entitled to interest against the contractor, the principal obligor on the bond, from the time when the debts to them severally became due, and the surety is liable to make good any default of the principal obligor in regard to payments, within the amount stated as the penal sum of the bond. The liability as against the surety becomes fixed as to each claim at the time that the statement of the claim is filed under the requirement of the statute. Interest on the amount stated in the bond should be charged from the date of the filing of the bill, and, where there has been a default before that date, the surety is liable to pay interest on that amount from the commencement of the suit.

TWO BILLS IN EQUITY, filed in the Superior Court respectively on March 14, 1904, and April 18, 1907, the first by the George H. Sampson Company, a corporation organized under the laws of the State of Maine, and the second by Alfred A. Hersey of Melrose, both of them against the Commonwealth of Massachusetts and also against the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, in the first case as surety on a bond given under the requirement of Pub. Sts. c. 16, § 64, and in the second case as surety on a bond given under the requirement of R. L. c. 6, § 77, the other defendants in the first case being contractors doing business as copartners under the firm name of Shanahan, Casparis and Company, and the other defendants in the second case being contractors, doing business as copartners under the firm name of T. G. Gill and Company, and also certain claimants, among them the Locke Canal Company, a corporation organized under the laws of the State of Virginia.

In the Superior Court the two cases were heard at different times by the same three judges, *Fessenden*, *Richardson*, & *Wait*, JJ. In this first case the defendant United States Fidelity and Guaranty Company demurred to the bill, and the demurrer was overruled by the judges. The case was submitted to them upon an agreed statement of facts, and they ordered that the bill be dismissed. The judges filed the following memorandum:

"The demurrer of the defendant Fidelity and Guaranty Company is overruled. We are unable to say that the gunpowder would 'form a part of the completed structure,' within the language of the case of *Kennedy* v. *Commonwealth*, 182 Mass. 480,

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and, upon the authority of that case, the bill must be dismissed. Decree accordingly."

A final decree was entered dismissing the bill, and the plaintiff appealed.

The second case was referred to Winfield S. Slocum, Esquire, as master, "to hear the parties and their evidence, and report his findings to the court, together with such facts, evidence and questions of law as either party may request."

Later the case was heard by the three judges upon the master's report and the exceptions thereto. They made a final decree which ordered, among other things, that the exceptions of the defendants United States Fidelity and Guaranty Company, Locke Coal Company, Daniel McDonald, Malden City Lumber Company, Robert C. Guptill and Alonzo A. West to the master's report be overruled, that the sum of $2,644.65 retained by the defendant Commonwealth of Massachusetts, and the bond executed to said Commonwealth by the defendants, Thomas H. Gill, John F. Gill and John F. Elkins, as principals, and the defendant United States Fidelity and Guaranty Company, as surety, constitute security under R. L. c. 6, § 77, for the payment for labor performed or furnished and for materials used in the construction of the public work described in the plaintiff's bill; that the plaintiff performed and furnished labor and furnished materials used in the construction of said public work under a contract with the defendants Thomas H. Gill, John F. Gill and John F. Elkins; that the defendants Addie L. Brown, the Locke Coal Company, Timothy O'Brien, Joseph P. O'Connell and George A. Parry, Richard H. Parry and Robert A. Parry, copartners under the name of Parry Brick Company, the Malden City Lumber Company, Benjamin Pope and Edgar W. Cottle, copartners under the firm name of Pope and Cottle, and William H. Wood, severally furnished materials used in the construction of said public work all under contracts with the defendants Thomas H. Gill, John F. Gill and John F. Elkins and that the plaintiff and the defendants Addie L. Brown, the Locke Coal Company, in respect of its claim for cement furnished, Timothy O'Brien, Joseph P. O'Connell and George A. Parry, Richard H. Parry and Robert A. Parry, copartners under the name of Parry Brick Company, the Malden City Lumber Company, Benjamin

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Pope and Edgar W. Cottle, copartners under the firm name of Pope and Cottle, and William H. Wood had severally complied with the provisions of the statute above mentioned and were entitled to the benefit of the security for the payment of the sums due them respectively from the defendants Thomas H. Gill, John F. Gill and John F. Elkins for such labor and materials together with interest on said several sums from the respective dates of filing of their respective statements under said statutes; and that the security above stated constituted trust property or a fund which the defendant Commonwealth of Massachusetts held in trust for the benefit of the plaintiff and the defendants above named entitled to the benefit of the security to the extent above set forth; that the several claims of the defendants the Carson Trench Machine Company, J. J. Doyle, D. G. Danahy, Robert C. Guptill, W. S. Kaulback, the Malden Grain Company, Daniel McDonald, Patrick McGovern, Edwin Troland, Alonzo A. West, John D. Welsh and the Locke Coal Company, in respect of its claim for coal furnished, be disallowed; that the sum retained by the defendant Commonwealth was not sufficient to pay the sums due the plaintiff and the defendants aforesaid for labor furnished and materials used in the construction of said public work, that the defendants Thomas H. Gill, John F. Gill and John F. Elkins, principals, and the defendant United States Fidelity and Guaranty Company, as surety, were liable upon said bond, that the defendants Thomas H. Gill, John F. Gill and John F. Elkins were financially irresponsible; and it was further ordered and decreed that the defendant United States Fidelity and Guaranty Company within sixty days after entry of this decree should pay to the Commonwealth $10,047.84, which was the sum necessary to enable the Commonwealth to pay the plaintiff and the defendants aforesaid the sums due them, aggregating $11,264.89 with interest to the date of the decree, and should also pay the Commonwealth interest on said sum of $11,264.89 from the date of the decree; and that thereupon the Commonwealth immediately should distribute the sums then held by it as aforesaid, as further directed in the decree. The defendant United States Fidelity and Guaranty Company and the defendant Locke Coal Company appealed.

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C. H. Waterman, for the plaintiff in the first case.

E. A. Whitman, *H. W. Barnum* & *F. E. Bradbury*, for the United States Fidelity and Guaranty Company.

E. C. Upton, for the Locke Coal Company, claimant.

F. L. Norton, for the plaintiff in the second case.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Commonwealth.

J. Wiggin, for the Malden City Lumber Company.

L. K. Storrs, for Pope and Cottle, and William H. Wood, submitted a brief.

KNOWLTON, C. J. The first of these suits is brought against the firm of Shanahan, Casparis and Company, the Commonwealth of Massachusetts and the United States Fidelity and Guaranty Company, to recover for materials furnished to the above mentioned firm in the construction of parts of an aqueduct for the supply of the city of Boston and its suburbs with water, which parts of the aqueduct the firm agreed to build under contracts entered into with the metropolitan water and sewerage board, under the provisions of the St. 1901, c. 168. The Pub. Sts. c. 16, § 64, which were in force when these contracts were made, required the officers or agents contracting in behalf of the Commonwealth for the construction or repair of public buildings or other public works, upon which liens might attach for labor or materials as against private owners, to "obtain sufficient security, by bond or otherwise, for payment by the contractor and by all sub-contractors for all labor performed or furnished and for all materials used in such construction or repair." Bonds were given to the Commonwealth by this firm, to secure the proper performance of these contracts and also payment for all labor performed or furnished and for all materials used in the carrying out of the contracts, which several bonds the United States Fidelity and Guaranty Company executed as a surety. The plaintiff furnished a large amount of gunpowder, which was used in the prosecution of the work, in excavating the rock by blasting for the trench, as required by the contracts. The greater part of this material so excavated was used in the construction of the aqueduct. The plaintiff seeks, by this suit, to obtain an enforcement of the liability of the surety on the bonds for the payment of the debt.

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The first question is whether a remedy can be given by the court upon such a bond. The decision in *Nash* v. *Commonwealth*, 174 Mass. 335, goes far towards answering this question. See also *Kennedy* v. *Commonwealth*, 182 Mass. 480. *Burr* v. *Massachusetts School for Feeble-Minded*, 197 Mass. 357. The only difference between that case and the present one, in this particular, is that the payment in that case was enforced against the money due from the Commonwealth upon the contract. It was held that the various sections of c. 195 of the Public Statutes, taken in connection with the broad and comprehensive language of the St. 1887, c. 246, subject the Commonwealth to proceedings in its own courts, "for the determination of claims of the character which civilized governments have always recognized," even though satisfaction of them has usually been obtained only by a direct appeal to the sovereign, or, in our form of government, to the Legislature. See *Murdock Parlor Grate Co.* v. *Commonwealth*, 152 Mass. 28, 31. In the same decision it was held that the statute makes the Commonwealth a trustee for persons having claims for labor and materials, and that this trust may be enforced by a court upon the fund due from the Commonwealth under the original contract.

The reasoning on which the decision rests is equally applicable to the enforcement of the security furnished by a bond. By the terms of the statute, this security is for the benefit of those having claims for labor and materials. The statute implies the existence of a right, on the part of these persons, to an enforcement of the bond to obtain payment for their debts. No mode of enforcement is prescribed. The courts are left to take proper action upon the application of those seeking relief. A petition in equity, like that in *Nash* v. *Commonwealth*, *ubi supra*, in which orders and decrees can be made, protecting the rights of all parties, is a proper proceeding in a case like the present. In many cases of this kind there would be numerous persons entitled to share in the security, some of whom might not be known when the suit was brought, and a proceeding in equity would be the only adequate mode of adjusting the rights of the parties. Statutory rights of beneficiaries, under contracts to which they are not direct parties, have often been recognized and enforced by the courts. *Harris* v. *First Parish in Dor-*

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chester, 23 Pick. 112, 114. *Stephenson* v. *Monmouth Mining Co.* 54 C. C. A. 499; 84 Fed. Rep. 114. See also *Ward* v. *Lewis*, 4 Pick. 518; *New England Bank* v. *Lewis*, 8 Pick. 113; *Frost* v. *Gage*, 1 Allen, 262; *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461. *Poland* v. *Beal*, 192 Mass. 559. *Burlew* v. *Hillman*, 1 C. E. Green, 23, 25. The present case differs materially from those in which it is held that, ordinarily, an action at law cannot be maintained in his own name by one who is not a party to a contract given to another person for his benefit. The right to compel the surety upon the bonds to make payment for the benefit of this plaintiff may well be enforced in this suit.

The next question is whether a claim for gunpowder, used in blasting to excavate the trench and to put the rock in condition for use in the construction of the aqueduct, comes within the provisions of the statute. The right to security is given, under the statute, only for labor and materials for which a lien might attach if the building or other public works belonged to private persons. Pub. Sts. c. 16, § 64. R. L. c. 6, § 77. *Kennedy* v. *Commonwealth*, 182 Mass. 480. It has been held, under the law relative to mechanics' liens, that the statute did not cover materials "that did not form a part of the completed structure." *Boston Furnace Co.* v. *Dimock*, 158 Mass. 552. This is undoubtedly true in reference to such materials as were under consideration in these cases. But this court has never had occasion to consider a case like the present, where the material was used directly upon the work or the structure in process of construction, for the purpose of bringing it into proper form or condition, and was entirely consumed in the use. In such a case it may be said that, in a general sense, the material enters into the completed structure. In this broad sense it forms a part of it, as it loses its identity and ceases to exist as a separate substance, in producing a direct effect upon the construction, which effect remains as a part of the result shown in the completed structure. In *Rapauno Chemical Co.* v. *Greenfield & Northern Railroad*, 59 Mo. App. 6, the court used this language: "Hence we think that the argument is unsound, that the lien in the case here must fail because the powder was entirely consumed, and, therefore, could not have been actually incorporated in the

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work. Such a construction of the statute we conceive to be a strained one, and not within its equity or spirit. What was said on this subject by the Supreme Court in the case of *Simmons* v. *Carrier*, 60 Mo. 581, must be read in the light of the particular facts of that case. There the claim was for lumber. The court held that a lien could not be maintained for such material, unless it actually entered into the construction of the building. This was undoubtedly the proper construction of the statute as applicable to lumber and such like materials to be used in or on the improvements; but in our opinion it is unreasonable to apply such a test to powder which is entirely consumed in its use." The same thought is expressed in *Hercules Powder Co.* v. *Knoxville, La Follette & Jellico Railroad*, 113 Tenn. 382, as follows: "The fact that the materials were consumed in the use and were thus destroyed in the construction, we think does not deprive the furnisher of his lien. The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road, at such places as require trestles and bridges and culverts. . . . All of the decisions upon this subject draw a clear distinction between explosives and explosive supplies used in the construction of a railroad company's roadway, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use."

In an opinion of the Court of Appeals in New York we find these statements: "The argument that dynamite is not a material, but a part of the contractor's plant which, like picks and shovels or mechanical appliances, are used in the performance of work, but are not considered materials furnished, within the purview of the statutes, seems to us inherently unsound. A steam shovel, an engine and boiler, picks, shovels, crowbars and the like, are tools and appliances which, while

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used in the doing of the work, survive its performance and remain the property of their owner. Not so, however, with materials that are used up in the performance of the work, and are thereafter invisible except as they survive in tangible results. We think that explosives when used as substitutes for other recognized 'materials,' are covered by the same principle. They enter into and form a part of the permanent structure quite as much as the earth, rails, ties, culverts and bridges that we can see and feel." *Schaghticoke Powder Co.* v. *Greenwich & Johnsonville Railroad*, 183 N. Y. 306. See also for similar doctrine, *Keystone Mining Co.* v. *Gallagher*, 5 Col. 23, 28; *Giant Powder Co.* v. *San Diego Flume Co.* 78 Cal. 193; *Giant-Powder Co.* v. *Oregon Pacific Railroad*, 42 Fed. Rep. 470. See also Phillips on Mechanics' Liens, (3d ed.) § 159; Boisoit on Mechanics' Liens, § 123; 2 Jones on Liens, (2d ed.) § 1623 a; 20 Am. & Eng. Encyc. of Law, (2d ed.) 348; 27 Cyc. 45.

This view of the law is held almost, if not quite, universally. While some of the decisions are under statutes a little broader than ours, we think the general principle upon which they depend is equally applicable to the Pub. Sts. c. 191, § 1. We are of opinion that the plaintiff is entitled to have the liability of the surety enforced for the payment of its debt.

The second case is brought against the firm of T. H. Gill and Company, their trustee in bankruptcy, the Commonwealth of Massachusetts, the United States Fidelity and Guaranty Company, and numerous other defendants who furnished materials to this firm for the construction of a sewer which the firm undertook to build for the Commonwealth, under a contract in writing executed in behalf of the Commonwealth by the metropolitan water and sewerage board. A bond was given to the Commonwealth with similar provisions, and with the same surety as in the other case. Some of the questions that arise are the same in both cases.

What we have already said shows that this kind of remedy is open to those who furnish labor or materials, such as are referred to in the statute. The demurrer of the surety on the bond was rightly overruled.

The greater part of the plaintiff's claim was for spruce piles, furnished and put in position as a part of the completed struc-

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ture of the sewer and designed for the support thereof. These were furnished and put in place under a contract, at a round price of eighteen cents per linear foot. The surety objects that they were not materials and labor for which a lien could be enforced, because the men who put them in position used a pile driver. If the contract is to be treated as one for materials only, to be delivered in their place in the ground, there is no room for the question. If, as is doubtless a better construction, this is deemed to be a contract for labor and materials, it was not necessary to separate the cost of the labor from the cost of the materials, or to give notice to the Commonwealth of a claim of a lien for materials, because the procedure under the lien law is not adopted into this statute. See R. L. c. 197, § 8. The statute applies to all cases where a lien might be acquired if proper proceedings were taken to secure it. We are also of opinion that the use of a pile driver by the plaintiff's men does not deprive him of his lien for their labor. In many kinds of mechanical work on buildings, workmen use not only simple tools, but machines of greater or less complication. The use of tools and machines which wear out in the use does not give a right to a lien for their value as materials. *Kennedy* v. *Commonwealth*, *ubi supra*. If it be assumed that no lien arises for the value of the use of a machine, apart from the labor of those who use it, we are of opinion that the use of tools and machines, controlled by workmen, rendering their labor upon a building or other structure more effective and valuable than it would be if it were performed with their hands alone, does not defeat a claim for a lien for labor in the operation of such a machine as a pile driver.

The plaintiff and several of the defendants furnished plank for sheathing for the trench of the sewer, which was left in position for the protection and support of the sewer, in accordance with the terms of the contract. While an important part of the purpose of it was to support the walls of the trench and protect the workmen, it also had another use, in reference to which it was retained in position permanently. The master found that this was a part of the permanent structure of the sewer, and he allowed the price of it properly under the statute.

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This lumber was furnished by several different parties, and it was so mingled together that it was impossible to tell exactly how much of that furnished by each party was used and finally retained in the trench, and how much was used for other purposes for which no allowance can be made in this suit. The whole amount retained permanently was definitely determined, and there was evidence from which the master found that the proportion furnished for this use, as compared with the whole amount delivered by each, was the same for all the parties. It is contended by the surety that there was no evidence to warrant this finding. It is true that the evidence was very indefinite, depending largely upon circumstances and inferences that do not approach very near to absolute certainty. Without reviewing the evidence, we are of opinion that it warranted the finding, and that the exception to this part of the master's report was rightly overruled.

In order to have the benefit of the R. L. c. 6, § 77, a claimant is obliged to file, with the officers or agents of the Commonwealth, "a sworn statement of his claim, within sixty days after the completion of the work." The only work previously referred to is the "construction or repair of public buildings or other public works." It is contended by the surety that this section requires the filing of each claim for labor or materials within sixty days after the last of such labor or materials is furnished by the claimant. There is no reference in the section to the time of ceasing to furnish materials, as a point from which the sixty days are to be reckoned for any claimant. The point of departure from which to ascertain the period of sixty days is "the completion of the work." We think this means the completion of the public work, for the construction of which the contract was made. Otherwise, the rights of claimants for the price of materials, if they had done no work, would be left indefinite. The language is very different from that of R. L. c. 197, § 6, which requires the claimant to file his statement "within thirty days after he ceased to labor on or to furnish labor or materials for the building or structure."

The defendant, the Locke Coal Company, appealed from the disallowance of its claim for coal, burned in engines which were used on the work to furnish power for different purposes. We

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are of opinion that there is a plain distinction between materials so used, and materials that enter directly into the work and become a part of it, or those that are consumed by being applied directly to substances to be moved or changed to make a place for the structure, or be incorporated into it. Under statutes like that of Massachusetts, liens for coal so used have generally been denied. *Philadelphia* v. *Malone*, 214 Penn. St. 90. *United States* v. *City Trust*, 23 App. D. C. 153. In the former of these cases the court said: "To hold with the plaintiff in this case is to require us to extend the bond to cover practically everything purchased by every sub-contractor on the work. If coal can be recovered for, then of course oil, waste, repairs or tools used in running the derrick and locomotive, or about the cars or repairing them, would have to be recovered for, and, going a step further, light furnished if the work was prosecuted at night. If coal for an engine can be recovered for, why not feed for horses, a farrier's bill or the bill of a veterinary?" We are of opinion that this claim was rightly disallowed. See *Kennedy* v. *Commonwealth*, 182 Mass. 480.

Some of the defendants having claims accepted notes, payable upon short terms of time, to enable them to raise money for necessary uses, each of which notes the master has found was not accepted as a payment, but taken for a temporary purpose. The surety contends that it was discharged from its liability for these claims by the giving of time to the debtors. There was no evidence of any loss occasioned to the surety by these arrangements, and the question is whether, apart from loss or detriment, the surety was thereby released from liability for payment of these debts. It is to be noticed that the bond is not to pay a stated debt to a particular person at a fixed time. It is to perform the contract, and pay for all materials used in carrying out the contract. This relates to making payments within a reasonable time and in a reasonable way. It does not take from the claimant his right to make reasonable arrangements with the contractor for his payments, even to a reasonable extension of time for a part of his debt, if thereby the surety is not prejudiced. These claims are in favor of persons and for amounts unknown at the time of the signing of the bond. They are unlike a specified payment

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to a particular person, to be made at a stated time, which the surety may be expected to desire to pay promptly, in order that he may seek his remedy against his principal if the principal fails to pay at the time stated. The agreement is to make good all deficiencies, if the contractor fails to finish the business properly and make his payments within a reasonable time. Upon such a contract, any reasonable arrangement in regard to payments, by these persons who are not mentioned in the bond, should not release the surety, unless the arrangement is prejudicial to him. This case comes within the decision and the reasons stated in *Guaranty Co.* v. *Pressed Brick Co.* 191 U. S. 416, and the ruling of the judges of the Superior Court was correct.

The rulings as to interest were also right. The several claimants were entitled to interest as against the contractor, the principal in the bond, from the time when the debts to them severally became due. The liability of the surety was to make good any default of the principal in regard to payments, within the amount stated as the penal sum of the bond. *Warner* v. *Thurlo*, 15 Mass. 154. *Bassett* v. *Fidelity & Deposit Co.* 184 Mass. 210. This statutory liability became fixed on each claim, as against the surety, at the time of filing the statements of the respective claims. Interest on the amount stated in the bond could rightly be charged, as it was charged, from the date of the filing of the bill. As there was a default before that date, the defendant is liable to pay interest on this amount from the commencement of the suit. *Bank of Brighton* v. *Smith*, 12 Allen, 243.

Decree in the first case reversed; decree in the second case affirmed.

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JOHN OAKEY *vs.* ROBB-MUMFORD BOILER COMPANY.

Middlesex. March 23, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action at common law by one, who was employed by the defendant to operate a riveting machine, to recover for personal injuries alleged to have been caused by the plug of a petcock on the machine being blown out and striking the plaintiff in the eye, the plaintiff can recover if he shows that he was in the exercise of due care and that the injury was due to the facts that the petcock was not a suitable and proper one for the use to which it was put and that it was defective when it was put on, although it appears that the petcock was procured from the defendant's stock room where there were other petcocks of different shapes and sizes, if it does not appear that there was in the stock room any petcock suitable for the need which the fellow employee sought to satisfy.

At the trial of an action by one, who was employed by the defendant to operate a riveting machine, to recover for personal injuries caused by a plug of a defective or unsuitable petcock on the machine being blown out and striking the plaintiff, it appeared that the plaintiff had worked on hydraulic riveting machines for about thirty years, that the machine at which he was injured was operated by compressed air instead of by water pressure and that it had been installed by the defendant for four weeks only, which constituted the plaintiff's entire experience with such a machine, that the petcock in question was procured from the defendant's stock room and by him was put into the machine, the plaintiff having nothing to do with the installation; and the plaintiff testified that he had never repaired the machine himself, although he had helped to do so, that he "did nothing but run the machine," that he was not a machinist and never had had any experience with machinery except in using it, that the only thing he had done with the petcock was to open it and close it about six times in four weeks, that he knew nothing of how it was made or of its inner construction, that he never had had anything to do with putting on petcocks, that for some time before the accident the machine had been giving him trouble, that he had thought something was wrong with the pump and repeatedly had reported its condition, and that the machine "kicked . . . every little while." *Held*, that it could not be ruled as matter of law that the plaintiff knew and appreciated and therefore assumed the risk of working with the defective petcock; and that the question whether he was exercising due care was for the jury.

TORT with counts at common law and under R. L. c. 106, § 71, cl. 1, for personal injuries resulting to the plaintiff while he was in the defendant's employ and as described in the opin-

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ion. Writ in the Superior Court for the county of Middlesex dated July 9, 1906.

The case was tried before *Sherman*, J. The facts are stated in the opinion. At the close of the evidence, the presiding judge submitted the case to the jury for the assessment of damages only. The jury assessed the damages at $5,000. Thereupon the presiding judge ordered a verdict for the defendant and by agreement of the parties reported the case for determination by this court, judgment to be entered for the defendant upon the verdict if the ruling of the trial judge was right, otherwise judgment to be entered for the plaintiff for $5,000 unless this court should be of opinion that the action could be maintained only under R. L. c. 106, § 71, cl. 1, in which case judgment was to be entered for the plaintiff for $4,000.

G. L. Mayberry, (*T. F. Carey* with him,) for the plaintiff.

J. Lowell & J. A. Lowell, for the defendant.

HAMMOND, J. While the plaintiff in the employ of the defendant was operating a riveting machine in the usual manner, the plug of a petcock which had been placed upon the machine by the defendant blew out and struck him in the eye, causing him great bodily injury. The case involves the usual questions of due care of the plaintiff and negligence of the defendant. We have carefully read the evidence, and without reciting it in detail, we think it warrants findings that the petcock in question was not a suitable and proper petcock to be used on a machine liable to be subjected to pressure as high as that to which this machine, in its ordinary use, was subjected; that it was defective when put on; that at the time of the accident the defect was the cause of the blowing out of the plug; and that in attaching this petcock to the machine the defendant did not use reasonable care for the protection of the plaintiff and other employees having occasion to use the machine. Nor does the fact that this particular petcock was selected by Pomeroy or Hewett relieve the defendant. It does not appear that there was any different or stronger petcock furnished by the defendant which could have been selected. For aught that appears this is precisely the kind of petcock the defendant intended should be put on. There is no evidence of a mistake in selecting a defective tool from a pile

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where there were tools not defective. The plaintiff was therefore entitled to go to the jury on the question of the negligence of the defendant.

There was also evidence of the due care of the plaintiff. It is argued, however, by the defendant, that the plaintiff was an experienced workman and that if there was any defect in the petcock it was his business to detect it and make the necessary repairs; and it must be said that there is considerable evidence in support of that view. On this point however the plaintiff testified as follows: "I had worked on the riveting machine up there about four weeks. Since it started it run bad — she hadn't been running exactly right. This petcock had been put in about a month before the accident. I had nothing to do with putting it in. Mr. Pomeroy put it in. The use of air instead of hydraulic was a new thing, and sometimes it wouldn't drive the rivets as it ought to, and I had to take them out. They had just commenced to use air instead of hydraulic on this machine about four weeks before. I had not worked on the air machine before this accident. I don't know what was the matter with this machine; it wouldn't drive the rivets as it ought to. There had been repairing done on this machine during those four weeks by Mr. Pomeroy. I had helped around. I had never repaired that machine myself. I had helped Mr. Pomeroy to repair it. My work was that I was supposed to drive rivets. I did nothing but run the machine. I am not a machinist. I never had any experience with machinery except in using it. I was used to hydraulics. I had nothing to do with the machine except to operate it, run it, use it. I had nothing to do with the petcock. I never did anything to it, only to open it and let the water out once or twice. I never examined it. I do not know how they were made. I did not know what the internal construction of these petcocks was — how they were fastened together."

On cross-examination he testified as follows: "I had worked on riveting machines for about thirty or thirty-one years. My work had been driving rivets. I drove them first with hydraulic pressure and last with air. During all these years there had been petcocks in these machines. I had to open them to let the air out. I never opened that one more than twice. There was

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no air on the other ones. Those where there was water pressure I opened every night when it was cold weather. . . . I have seen petcocks for twenty-eight years, but not that kind, nor on that machine. I have unscrewed them in cold weather for twenty-eight years. I knew what petcocks were. I knew a part about them. I knew their purpose was to let the water out. I had run machines for twenty-eight years. I had one man and a couple of boys under me. I had helped Pomeroy repair machines in this factory. I was helping him set this machine up in South Framingham. I helped other machinists on the riveting machine at Cambridge. I couldn't say how often — whenever there was a riveting machine out of order. I never had anything to do with putting on petcocks. I saw them put on. I was about the machine when petcocks were being put on. Sometimes they were put on when I was away. I had seen them put on perhaps half a dozen times. I had been in the stock room and had seen petcocks there. The petcock used as an exhibit was something similar to the one that was on the machine. I couldn't say whether the screws were the same thread. It looks the same — quarter inch. The petcock put on in South Framingham differed from the one on the machine in Cambridge only in the stem — and the thumbscrew was there. There was a thumbscrew on the side instead of this little handle. It had the same parts. I don't think there was a washer on those in Cambridge. I don't know whether there was a washer on the machine in South Framingham. The petcock was screwed into the pipe. The machine had been giving us trouble for some days before the accident. I thought there was something wrong with the pump — I reported it. It wasn't working right on the day of the accident. I reported that. It was still working badly at the time. It commenced to work better and then it commenced to kick again, every little while. I unscrewed the petcock to let the air out. I had probably done it half a dozen times in the four weeks. There were working under me at the time a couple of boys and a 'steadier' — a man to steady the machine. The room where the machine was was part of the shop and there were men all around there, but only four of us on the platform. It was the same machine I had worked on in Cambridge but not

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the same force; air instead of hydraulic; that was the only difference."

While it thus appears that the plaintiff had used petcocks many years, yet the plaintiff had been working where there was not the same force used as at the time of the accident. Compressed air was used and had been for several weeks; and the evidence would warrant a finding that while the plaintiff knew how to use a petcock he had no knowledge of the strength required to meet successfully the pressure exerted on this machine. Although the machine had been working badly he testified that he thought there was "something wrong with the pump." And for aught that appears in the evidence that may have been the primary cause of the bad action of the machine. This action he testified he reported. While the case is close it could not be ruled as matter of law that the plaintiff knew and appreciated, and therefore assumed, the risk of working with this defective petcock, or that it was his duty to see that it was safe.

The evidence would support a finding upon the common law count. *Hannan* v. *American Steel & Wire Co.* 193 Mass. 127. *Erickson* v. *American Steel & Wire Co.* 193 Mass. 119. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Gregory* v. *American Thread Co.* 187 Mass. 239, and cases cited.

In accordance with the terms of the report there is to be entered

Judgment for the plaintiff for $5,000.

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ALICE MOUNTFORD *vs.* CUNARD STEAMSHIP COMPANY, LIMITED.

Essex. March 23, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Pleading, Civil, Answer. *Assault and Battery. Contract. Carrier. Ship. Immigrant. Evidence,* Presumptions and burden of proof, Materiality. *Practice, Civil,* Exceptions, Conduct of trial. *Damages,* For eviction from a steamship.

In an action by a passenger against the owner of a steamship the declaration contained two counts, one for assault and battery in forcibly ejecting the plaintiff from the ship, and the other for breach of contract in so doing, and the answer, besides a general denial, stated, "If the plaintiff shall introduce evidence tending to show that at the time of the acts complained of she was a passenger . . . the defendant will show that she was suffering from trachoma, a dangerous, contagious disease, and that the defendant rightfully ejected her." A trial occurred without objection to the form of the answer. *Held*, that, if such objection had been taken, the defendant could not have put in any evidence of the justification thus defectively sought to be averred.

The answer in an action by a passenger against the owner of a transatlantic steamship for forcibly ejecting the plaintiff from the ship set up a general denial and also averred that the defendant rightfully ejected the plaintiff because "he was suffering from trachoma, a dangerous, contagious disease." *Held*, that under such answer the defendant had no right to rely in justification of the expulsion of the plaintiff upon evidence tending to show that such expulsion occurred because the ship's physician, a duly qualified medical man, having examined the plaintiff, reported to the defendant that he ought not to be allowed upon the ship because he had trachoma, a dangerous, contagious disease.

Where, in an action of tort for assault and battery to recover for forcible expulsion of the plaintiff, a passenger, from a transatlantic steamship of the defendant, the answer sets up in justification of the expulsion that the plaintiff was suffering from trachoma, a dangerous, contagious disease, the burden is upon the defendant to make out the justification alleged, and not upon the plaintiff to disprove it by showing affirmatively that his expulsion was wrongful and without justification. *Whether*, where the action is for breach of contract in committing the same act and the same justification is set up in the answer, the same rule as to burden of proof applies, was not decided.

In an action in which the declaration contained two counts, one in tort and one in contract, and the answer set up a justification of the acts of the defendant, and a different rule as to the burden of proof might apply as to the different counts, the presiding judge, against the objection and subject to an exception of the defendant, ruled that the burden of proof was upon the defendant, but made no distinction between the two counts. The defendant did not ask that such distinction be made, and therefore this court, having decided that the ruling was right as to the count in tort, without deciding whether it was right as to the count in contract, overruled the defendant's exception.

Although, at the trial of an action by a passenger against the owner of a transatlantic steamship to recover for an unlawful expulsion of the plaintiff, a pas-

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senger, as the ship was about to sail from Liverpool, England, for Boston, where the defendant relied in his answer upon an averment that the plaintiff at the time was suffering from trachoma, a dangerous and contagious disease, evidence that, about three months before, as he was about to sail from Boston to Liverpool, the defendant's "doctors or people" examined him, and also evidence that, the morning after his expulsion by the defendant, he sailed for Boston from Liverpool by a steamship owned by a different person than the defendant, is immaterial, an exception by the defendant to its admission will not be sustained, since the defendant could not have been prejudiced by its admission.

In an action by a woman passenger against the owner of a transatlantic steamship to recover for a wrongful eviction from the ship, evidence that because of the eviction she was left in Liverpool, England, a long distance from her friends, is competent on the question of damages.

Where, in an action by a woman passenger against the owner of a transatlantic steamship to recover for an alleged wrongful expulsion from the ship, the defendant seeks to justify his acts upon the ground that the plaintiff was suffering from trachoma, a dangerous and contagious disease, testimony of the plaintiff's husband and others that, although they associated with the plaintiff intimately during periods near to the date of the expulsion, they did not contract the disease, is admissible in the discretion of the judge presiding at the trial.

TORT OR CONTRACT. Writ in the Superior Court for the county of Essex dated February 4, 1905.

The first count of the declaration alleged in substance that the plaintiff, having purchased a ticket for passage from Liverpool, England, to Boston upon the Ivernia, a steamship of the defendant sailing between those ports, boarded the steamship with her baggage, that "after the pretense of a medical examination of herself by the defendant company's agents and servants, she was assaulted by the agents and employees of said company and with great force and violence was ejected from said steamship." The second count stated that, "relying upon said promise and agreement of the defendant company, she boarded said steamship at said Liverpool on said day, with her baggage and presented her said ticket, but that the defendant company in violation of its said promise, agreement and contract with her, with force and violence put her off of said steamship and wholly deprived her from passage therein. Wherefore the defendant company owes the plaintiff damages for its breach of said contract."

The case was tried before *Sanderson*, J. There was evidence tending to show that at the time of the expulsion of the plaintiff complained of, she was not suffering from trachoma. Other facts are stated in the opinion.

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At the close of the evidence, the defendant requested the presiding judge to rule as follows:

"1. Upon all the evidence the plaintiff cannot recover in this action. . . .

"8. If, at the time of the acts complained of, the plaintiff was suffering from trachoma, the defendant company would have been guilty of a crime against the laws of the United States of America if it had brought her to this country.

"4. If, at the time of the acts complained of, the plaintiff was suffering from trachoma, it was the duty of the defendant company, under the laws of the United States, to remove her from its steamer and to use whatever force was reasonably necessary to remove her.

"5. If, at the time of the acts complained of in her declaration, the plaintiff was suffering from trachoma, the defendant was justified in removing her from its steamer, and in so removing her was justified in using whatever force was reasonably necessary. . . .

"7. Upon all the evidence in this case the jury would not be justified in finding that the medical officer of the defendant company who examined the plaintiff was not competent.

"8. If the medical officer, who examined the plaintiff on board the ship at Liverpool, had reasonable grounds to believe and did believe that the plaintiff was suffering from trachoma at the time of the acts complained of in her declaration, the defendant was justified in removing her from said ship, and in using to remove her from said steamship whatever force was reasonably necessary.

"9. There is no evidence upon which the jury would be justified in finding that the medical officer who examined the plaintiff on board ship at Liverpool did not, upon reasonable grounds, believe that she had trachoma.

"10. The Cunard Steamship Company, upon being informed by their medical officer that the plaintiff was suffering from trachoma at the time of the acts complained of in her declaration, was justified in removing her from their steamship and was justified in using as much force as was reasonably necessary to remove her therefrom.

"11. If the defendant company used reasonable care in the

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appointment of their surgeon, and said surgeon at the time of the acts complained of in the plaintiff's declaration, after examining the plaintiff, notified the defendant company that she had trachoma, the defendant had a right to remove the plaintiff from their steamship and were justified in using as much force as was reasonably necessary to remove her. . . .

"16. The burden of proving that she was wrongfully removed from the defendant's steamship rests on the plaintiff."

The judge refused to rule as requested, and in his charge submitted to the jury the following question: "Was the plaintiff afflicted with a dangerous, contagious disease at the time of her removal from the defendant's ship?" The jury answered "No," and found for the plaintiff. The defendant alleged exceptions.

W. L. Putnam & J. L. Putnam, for the defendant.

A. P. White, for the plaintiff.

SHELDON, J. The first count of the plaintiff's declaration is in tort, and the gravamen of the charge made therein is that she was assaulted by the defendant's agents and employees and forcibly ejected from the defendant's steamship. Her second count avers that she bought from the defendant a ticket for her passage from Liverpool to Boston and paid the defendant therefor, and the defendant in consideration thereof agreed to furnish to her transportation on its steamship Ivernia for such passage; and that she boarded that steamship at the appointed time and place with her baggage and presented her ticket, but that the defendant, in violation of its agreement with her, "with force and violence put her off of said steamship and wholly deprived her from passage therein." The defendant in answer denied all her allegations, and then added to its answer by amendment these words: "If the plaintiff shall introduce evidence tending to show that at the time of the acts complained of in her declaration she was a passenger on the defendant's steamer, the defendant will show that she was suffering from trachoma, a dangerous, contagious disease, and that the defendant rightfully ejected her from its steamer." Under this averment in the answer, the defendant of course could not, if the objection had been taken, have put in any evidence of the justification thus defectively sought to be averred. *Cassidy* v. *Farrell*, 109 Mass. 397. *Suit* v.

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Woodhall, 116 Mass. 547. But no objection was taken to this form of averment, and we must now treat the answer as having sufficiently alleged that the plaintiff was suffering from trachoma, and so that the defendant was justified in ejecting her from its steamer.

At the trial, the defendant contended that the plaintiff was suffering from the disease mentioned; and that it was therefore justified in excluding her, both at common law and under the U. S. St. of 1903, c. 1012, 32 U. S. Sts. at Large, 1213, §§ 2, 9, 11, 13. The judge who presided at the trial ruled in substance that if the defendant showed by a fair preponderance of the evidence, the burden of proof being upon it, that the plaintiff was afflicted with trachoma, and that this was a dangerous, contagious disease, then the defendant both had the right and was under the duty to put her off the boat, using only reasonable force in so doing.

The defendant also contended at the trial "that its ship doctor, a duly qualified medical man, whose duty it was to examine the plaintiff and other third cabin passengers, having examined the plaintiff and reported to the defendant's agents that the plaintiff ought not to be permitted to sail because she had trachoma, a dangerous, contagious disease, the defendant was justified in removing her from [its steamship], both under the United States statutes and at common law." This contention the defendant presented to the judge in its requests for rulings; but he refused to rule in accordance therewith, and ruled that to make out a justification the defendant must show that the plaintiff, when she was ejected from the defendant's ship, was suffering from a dangerous, contagious disease.

In our opinion it now must be taken that this ruling was made upon the pleadings in the case. Express reference to them is made in the bill of exceptions, and that must have been intended for some purpose. But we have seen that the only justification set up in the answer is that the plaintiff was actually "suffering from trachoma, a dangerous, contagious disease." If therefore the burden was upon the defendant to make out a justification and not upon the plaintiff to disprove it by showing affirmatively that her removal from the defendant's ship was wrongful and without justification, it follows

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that the ruling upon this question was right, because the defendant had no right to rely upon a justification which it had not set up in its answer.

In our opinion it cannot be doubted that as to the first count of the declaration the burden did rest upon the defendant. That was expressly decided in *St. John* v. *Eastern Railroad*, 1 Allen, 544, a case somewhat similar to this. *Jackson* v. *Knowlton*, 173 Mass. 94. *Hathaway* v. *Hatchard*, 160 Mass. 296. As to the second count, if the case stood upon that alone, there would be much ground for the contention that, as it was intimated in *St. John* v. *Eastern Railroad*, *ubi supra*, might be the case, the burden was upon the plaintiff to show as well her legal right to be carried on the steamship to Boston as to show that violence had been done to her person. There certainly would be much to say upon both sides of the question. It was admitted that the defendant had sold to the plaintiff a ticket by which it promised for a valuable consideration to give to her the transportation to which she claimed to be entitled. So far as appears, it did not return or offer to return to her the passage money which she paid to it. It had received her baggage without objection, and retained this on board of its ship without any offer or attempt to return it to her. It contended that by reason of the sickness of the plaintiff it was justified in refusing to carry out its agreement made with her. But we do not think it necessary to pass upon this question. The case was tried as a whole. The defendant's contention that the burden rested throughout upon the plaintiff was made as to the whole case. The judge's attention was not called to any difference between the two counts, and the defendant's counsel in their learned and able argument in this court have not set up any such difference, but have made their contention here also upon the whole case. As the case was presented to him at the trial, we are of opinion that the judge properly ruled that the burden was upon the defendant to prove the justification which it had set up, and that it could not rely upon any other justification than the one which it had set up in its answer.

Accordingly the defendant's first, eighth, tenth, eleventh and sixteenth requests for instructions were properly refused, and

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the defendant has no right of exception to what was said upon these subjects in the instructions given to the jury. The fourth and fifth requests were given in substance, subject to the qualification of the jury's finding that the plaintiff's trachoma was then a dangerous and contagious disease; and this has been negatived by the special finding of the jury. In our opinion, the defendant cannot now complain of this qualification. The third, seventh and ninth requests were not material to the issue before the jury, and the judge had a right to refuse them.

The testimony of the plaintiff that when she went to Liverpool early in the summer of 1904 she was examined "by the Cunard doctors or people," and that this included an examination of her eyes, and her testimony that she sailed from Liverpool in the morning after her eviction from the Ivernia on a vessel of another line seems to us to have been immaterial. The defendant could not have been prejudiced by the admission of this testimony. And the testimony of the plaintiff that she was left in Liverpool at a long distance from her friends cannot be said to have been incompetent. If the defendant was liable for the assault and eviction, evidence of what immediately and naturally followed thereon was competent on the question of damages. *Blake* v. *Damon*, 103 Mass. 199.

The testimony of the plaintiff's husband and of other witnesses that their intimate relations with her * were not followed by any trouble with the eyes, was competent in the discretion of the presiding judge. *Field* v. *Gowdy*, 199 Mass. 568, 574. *Sargent* v. *Merrimac*, 196 Mass. 171, 174. *Yore* v. *Newton*, 194 Mass. 250. *Reeve* v. *Dennett*, 145 Mass. 23. *Baxter* v. *Doe*, 142 Mass. 558.

The other exceptions taken have not been argued.

Exceptions overruled.

* The plaintiff's husband testified that he and the plaintiff, during their married life of more than fifteen years, used the same towels, slept in the same bed, took their meals together and made no effort of any kind to use separate articles, and that he never had any trouble with his eyes. Mrs. Nellie Reed, who lived in the same house with the plaintiff for a considerable time before plaintiff went to Europe and after her return, testified that she had no trouble with her eyes.

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FRANCIS M. McCARTHY *vs.* GUY C. EMERSON.

Suffolk. March 24, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Civil Service. Mandamus.

Under St. 1904, c. 314, as modified by St. 1905, c. 243, one who duly is enrolled in the classified list of the civil service of the Commonwealth, before he can be removed by his superior officer, is entitled, if he requests it in writing, to a full and proper hearing in the nature of a trial.

Where, upon being notified by his superior officer that he was indefinitely suspended, one, who duly was enrolled in the classified list of the civil service of the Commonwealth, requested in writing that he be given a hearing on the charges against him according to St. 1904, c. 314, as modified by St. 1905, c. 243, and upon a day set by his superior officer attends before him for that purpose, but, when he requests his superior officer to furnish him with information and to produce for him the testimony in support of the charge and specifications against him and letters from him to the department upon which certain specifications are based, such requests are refused, and he is not allowed to be sworn, he is not given such a hearing as the statute requires, and, upon his petition after his removal following such proceedings, a peremptory writ of mandamus reinstating him will be issued.

PETITION, filed in the Supreme Judicial Court for the county of Suffolk on September 17, 1908, for a writ of mandamus to compel the respondent, the superintendent of streets of Boston, to restore the petitioner to his former position as foreman in the paving division of the street department.

The case was heard by *Hammond*, J., and by him reserved for determination by the full court. The facts are stated in the opinion.

The case was submitted on briefs.

J. H. Colby & E. A. Bayley, for the petitioner.

A. L. Spring, for the respondent.

SHELDON, J. The petitioner was employed as a foreman in the paving division of the street department of the city of Boston, and was removed or indefinitely suspended from that position on or about June 2, 1908, by the respondent, who was and is the superintendent of streets of that city. He asks in this petition for a writ of mandamus to compel the respondent to restore him to his former position. He was duly enrolled

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in the classified list of the civil service of the Commonwealth, and by the terms of St. 1904, c. 314, as modified by St. 1905, c. 243, he could not be removed or indefinitely suspended "except for just cause and for reasons specifically given in writing." This statute also provided that he should be notified of such proposed action, should be furnished with a copy of the reasons required to be given, and should, if he so requested in writing, "be given a public hearing and be allowed to answer the charges preferred against him either personally or by counsel." The question is whether as matter of law it appears affirmatively from the admitted facts and from the evidence which was heard by the single justice, that his removal was contrary to these provisions of the statute.

There is no doubt that the reason assigned for the petitioner's removal, "neglect of duty," was a sufficient cause; and there is no doubt that if he was given a public hearing upon this charge and the specifications filed thereunder, the respondent's conclusion was final and cannot be reviewed by this court. *Ayers* v. *Hatch*, 175 Mass. 489, 492. *Hogan* v. *Collins*, 188 Mass. 43. *Dunn* v. *Mayor of Taunton*, 200 Mass. 252, 258. Whether he was given such a hearing depends upon the meaning of that word in the statute already referred to. The petitioner's contention is that it ought to be taken as meaning that he must have substantially a fair trial, though perhaps an informal one, upon the charge preferred against him; the respondent claims that the statute was intended merely to prevent a person's being discharged without publicity, and without having a chance to appear before his superior officer and make whatever statement he might desire, and have the transaction made a matter of public record.

The respondent argues that the difference between the language of the statute before us and that of other statutes upon similar subjects is such as to maintain his contention. This statute provides that the person sought to be removed shall if he so requests in writing, "be given a public hearing and be allowed to answer the charges preferred against him either personally or by counsel." St. 1904, c. 314, § 2. R. L. c. 19, § 23, as amended by St. 1905, c. 150, gives to veterans the right to "a full hearing" after at least seventy-two hours' written notice

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with a statement of the reasons for the proposed action, and provides that the hearing shall be before certain named boards or officers. St. 1906, c. 210, as amended by St. 1907, c. 272, provides that police officers and members of the district police, with certain exceptions, shall not be removed, etc., "except for just cause and for reasons specifically given in writing," and gives them the same right to a hearing provided for by St. 1904, c. 314, § 2. In St. 1900, cc. 69, 133, provision is made for a hearing before the board of selectmen. But we do not consider that the fact that in this act of 1904 provision is not made for a hearing before an independent tribunal can be made the ground for a difference in the construction of these statutes. There is no less need for a full and proper hearing, in the nature of a trial, if there is reason to apprehend some bias on the part of the appointed tribunal against the person to be heard than if the former were wholly free from prejudice. If the statute before us had provided simply that the employee or officer sought to be removed should first have an opportunity to give an explanation of his conduct, a different question would be presented. *People* v. *Thompson*, 94 N. Y. 451. But in that very case it was said by the court (p. 463) that under a statute providing that certain officers might "be removed by the mayor for cause and after an opportunity to be heard," the charges must be specified, and unless admitted must be proved to be true, with the right to the officer to cross-examine the witnesses and to call others. Morton, J., in *Ayers* v. *Hatch*, 175 Mass. 489, 492, uses language to the same effect, citing *People* v. *New York*, 19 Hun, 441, *People* v. *Nichols*, 79 N. Y. 582, and *People* v. *New York Fire Commissioners*, 12 Hun, 500. The right to a hearing, with notice of the charges, especially where, as here, the right to be represented at such hearing by counsel is especially secured, contemplates a proceeding in the nature of a judicial investigation, although it is one in which the attainment of substantial justice rather than the observance of any particular formalities is aimed at. *People* v. *Dalton*, 158 N. Y. 204. *People* v. *Police Commissioners*, 155 N. Y. 40. *Joyce* v. *Chicago*, 216 Ill. 466. *State* v. *Superior City*, 90 Wis. 612.

It sufficiently appears that the petitioner has had no such hearing. He was not allowed to know anything of the evidence

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on which the charge and specifications against him were based. His request for information and for the production of the testimony against him was expressly refused. He was not allowed to be sworn. He asked for the production of the letters which he had sent to the street department, and which might be and were claimed to be material to the second specification against him, and this was refused. Mr. Adams, who at that hearing represented the respondent, justified the course taken on the alleged ground that the hearing was not a judicial one. On Mr. Adams's advice the petitioner was not allowed to ask any questions of the respondent. Permission to attend the hearing apparently was refused by the respondent to employees of the department whose testimony the petitioner desired to put in. The petitioner never had the hearing to which he was entitled. He was merely allowed to make such statement as he desired. We can find in the course adopted nothing more than an attempt to evade the provisions of the statute, as in *Garvey* v. *Lowell*, 199 Mass. 47, and *Ingram* v. *Jersey City*, 34 Vroom, 542. If there were any possible doubt upon this question, it would be removed by the testimony of the respondent given before the single justice which, taken in connection with the admission of the petitioner's veracity made at the hearing before the respondent, came very near to being a complete vindication of the petitioner. Although it is true that the respondent's determination would have been final and conclusive if the hearing provided for by the statute had really been given to the petitioner, *Gaw* v. *Ashley*, 195 Mass. 173, 177, upon the facts before us the removal was unlawful, and a peremptory writ of mandamus must issue as prayed for.

So ordered.

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FRANCENA M. FLETCHER, administratrix, *vs.* HAMMOND T. FLETCHER.

Middlesex. March 26, 1909. — May 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Executor and Administrator, Accounts, Distribution by agreement before appointment of administrator.

By an agreement under seal among the heirs at law and next of kin of a person who died intestate, made before the appointment of an administrator, the parties agreed upon one of their number to be appointed administrator and upon a division of the estate of the deceased. The personal estate amounted to $10,000, and $4,000 thereof was distributed before the administrator was appointed in accordance with the agreement. After the appointment of the administrator an inventory was filed charging him with assets of the value of $10,000, and thereafter in further performance of the agreement he distributed and disbursed the remaining assets of the value of $6,000. *Held*, that the administrator's account should contain in the second schedule, which by R. L. c. 150, § 2, should contain items showing payments, charges, losses and distributions, an item of $4,000, representing assets which never came into his hands, and items amounting to $6,000, representing the disbursements and distributions made by him in accordance with the agreement, and that the account so stated should be allowed.

APPEAL from a decree of the Probate Court for the county of Middlesex allowing the second and final account of the plaintiff as administratrix of the estate of Theodore C. Fletcher.

The case previously was before this court on exceptions alleged by the appellant at the hearing before a single justice of an appeal from a decree of the Probate Court allowing the first account of the administratrix, and was reported in 191 Mass. 211. Thereafter the second and final account was filed in the Probate Court and was allowed. After appeal, the case was referred to an auditor, and then was heard by *Loring*, J., who ruled that both the first and the second accounts of the administratrix were before him for a rehearing, and found that, because before the appointment of the administratrix $6,868 of the $10,884.96 with which the inventory charged her had been distributed by the parties under the terms of the agreement referred to in the opinion, Schedule B * of a first and final

* Schedule A of the account, hereinafter referred to, is that described as "first" in R. L. c. 150, § 2; Schedule B is the one described as "second."

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account should contain an item of $4,016.96 representing property in the inventory which never came into the hands of the administratrix; that Schedule B also should contain items showing the distribution, made in further carrying out of the agreement, of the balance of the estate (which was capital stock in various corporations and needed the official action of the administratrix and therefore had to await her appointment), and an item of $50 paid on account of the expenses of administration, which amounted to $875.03; and that the case be remanded to the Probate Court for further proceedings in accordance with the decree thus to be entered. Schedules A and B of the account as thus stated by the single justice balanced.

Other facts are stated in the opinion.

The case was reported by the single justice for determination by the full court.

The case was submitted on briefs.

A. M. Pinkham, for the appellant.

W. H. Brown, for the administratrix.

BRALEY, J. In the settlement of the estate between themselves, and before the appointment of an administrator, the adult heirs at law of the intestate entered into an agreement with his widow and minor daughter, which we held upon the appellant's exceptions to be valid and binding in the former decision of *Fletcher* v. *Fletcher*, 191 Mass. 211. If it was further decided that the administratrix subsequently appointed was not relieved from accounting, the account was said to have been made up on an erroneous basis, although the result showed there had been a complete and equal division of the property. By the appeal in the present case this fundamental question is again raised in a different form.

The object of the agreement is to be ascertained from the instrument itself, by which the appellant became obligated as an heir at law to abide by the adjustment of the indebtedness of the intestate and to accept the division of his father's estate as therein provided, instead of a settlement and distribution by the Probate Court. If entered into at inception as a compromise for the mutual benefit of those interested, the only question for decision is, whether according to its terms the appellant has received his share. Having thus bound himself he cannot abro-

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gate the obligation which has been fully performed, and call upon the administratrix for an accounting as if the agreement was not in existence.

It is stated in the report that before the appointment of the administratrix the parties met, and, after estimating the value of the property, performed the agreement, by the parties of the first part deeding the farm and giving a bill of sale to the widow and her minor child, who also received their share of the money and then delivered to the parties of the first part the promissory notes and a part of the shares of corporate stock enumerated as coming to them. After this partial delivery of the stock, as there remained certain shares to be formally transferred, the appellee upon her appointment was required to account only for these remaining assets. But, as all the personal property described in the agreement was inventoried, when the first and second account is stated, the appraisal should be diminished by crediting the amount of this error, namely, the difference between the value of the estate thus remaining to be administered, and the face of the inventory. The remaining stock also at the agreed valuation with the dividends so far as she has been found chargeable therefor, is to be allowed as a further credit, with a few other minor disbursements and the expenses of administration, which are found to more than offset any remaining balance.

Although not made up in this exact form, the judge finds that the statement of the receipts and payments actually rendered is correct and should be allowed as a full accounting when expressed in the form of the order for a decree appearing in the report. But if, as thus recast, it shows that the estate has been fully administered in strict conformity with the agreement, it also appears that when stated for the purpose of an equal distribution upon the basis of the agreed valuation of the personal and real property, after the outstanding debts of the intestate have been deducted, the appellant in common with the other heirs has received his full share. By whichever way the appellant goes, the agreement has been performed by the parties of the second part, and the estate fully administered. *Fletcher* v. *Fletcher*, *ubi supra*. In the forum of morals, as well as of law, he has received all that is justly due him.

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The division by the heirs having substantially exhausted the assets, and left large disbursements to be personally borne by the administratrix, she should not be further burdened by the costs of a frivolous appeal.

The decree framed by the single justice is to be entered, upon being so modified as to include the costs of this appeal, which are to be paid by the appellant.

Ordered accordingly.

JOSEPH DELANEY *vs.* FRAMINGHAM GAS, FUEL AND POWER COMPANY.

Middlesex. January 13, 1909. — May 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability, In a factory. *Evidence*, Opinion: experts, Circumstantial, Remoteness, Competence, Hospital records. *Practice, Civil*, Conduct of trial.

At the trial of an action at common law against a gas company by an employee in the defendant's gas works, to recover for personal injuries received from an explosion which occurred as hot tar was being poured into a barrel, there was evidence which tended to show that the barrel was second hand and had been purchased empty by the defendant from a shoe company to whom it had been furnished filled with a cement containing naphtha or gasoline, that some of the solution still was in the barrel when delivered to the defendant, that the defendant did not cause the barrel to be inspected as to its contents, except to ascertain whether there was water in it which would be harmful to the tar, and that the hot tar when poured into the barrel caused evaporization of the naphtha or gasoline which mixed with air made an explosive compound. It appeared that other barrels had been so purchased by the defendant and that no explosion ever had occurred in them. The plaintiff testified that there was no flame which could have ignited the compound other than that of a gas jet fifteen feet distant from the barrel and of a retort fire twenty-two feet distant, and, of two experts called by the plaintiff, one testified that the compound could not have been ignited from the gas jet, and the other that it might have been, but that it was highly improbable that it was. *Held*, that the jury were warranted in finding that the flame of the gas jet or of the retort fire ignited an explosive compound formed in the barrel, that there was a duty on the part of the defendant to make an inspection of the barrel before using it for hot tar, and that the injury to the plaintiff was the direct and proximate result of the failure of the defendant to perform that duty.

Until he sees some indication to the contrary, an employee in a gas factory has a right to assume that a barrel, furnished to him by the superintendent of the

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factory for the purpose of being filled with hot tar, has received whatever inspection is necessary to see that it can be used by him with safety for that purpose.

In framing a hypothetical question to be put to a witness qualified as an expert, the usual practice is to allow counsel to include in the question an assumption of the existence of such facts and conditions as a jury may have a right to find upon the evidence as it is at the time the question is put to the witness or as there may be fair reason to suppose it thereafter in the course of the trial may appear to be; and in determining whether such a question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statement as to what the evidence may be.

It is within the discretion of the judge presiding at the trial of an action against a gas company by an employee to recover for injuries due to an explosion alleged to have been caused by the ignition of an explosive gaseous compound resulting from hot tar being poured into a barrel which previously had contained a mixture of which naphtha or gasoline was an ingredient, to admit testimony as to the liability of naphtha in a barrel so to dry as to leave a small amount of naphtha therein, and as to the condition of old barrels.

St. 1905, c. 330, relative to the keeping by certain hospitals of records of the cases under their care and the history of the same, and to the admissibility in evidence of such records as to all matters therein contained, before its amendment by St. 1908, c. 269, did not make so admissible records made before its enactment.

The attending physician at a hospital made memoranda of the history and facts as to cases under his care and handed the memoranda to a person in the employ of the hospital whose duty it was to make in a record book a copy of the memoranda, and to have the custody of the record so made. Such recorder had no personal knowledge of the facts so recorded. In a case where such a record was comparatively recent and the attending physician was not shown to have been dead, it was *held*, that the record, produced by the recorder and custodian, was not admissible in evidence, under the rule of the common law, to prove the facts therein stated.

TORT for personal injuries received by the plaintiff while in the defendant's employ, as stated in the opinion. The declaration contained two counts, the first being at common law alleging failure on the part of the defendant to supply the plaintiff with a reasonably safe place in which, or materials with which to work, or to warn him of the dangers surrounding his work, and the second being under R. L. c. 106, § 71, cl. 2, alleging negligence of the defendant's superintendent. Writ in the Superior Court for the county of Middlesex dated April 24, 1906.

The case was tried before *Bell*, J. The facts are stated in the opinion. At the close of the evidence, the plaintiff elected to proceed only under the first count of the declaration, and the defendant requested the following rulings:

"1. On all the evidence this action cannot be maintained. . . .

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"5. It is for the plaintiff to produce evidence from which fairly the inference can be drawn that the defendant knew of the danger of an explosion while the plaintiff did not.

"6. Unless the defendant had more knowledge of the danger and more opportunity for such knowledge than the plaintiff, then this action cannot be maintained. . . .

"13. If the possibility of the explosion of an empty barrel when being filled with tar under the circumstances of this case was a matter of common knowledge, the risk of injury from such an explosion was assumed by the plaintiff. If it was not a matter of common knowledge, then there is no evidence in this case from which the jury are entitled to infer that the defendant or its superintendent knew or ought to have known of the possibility of such an explosion."

The above rulings were refused.

The plaintiff requested the following rulings:

"12. There is no evidence that the defendant or its agents knew that the barrel which exploded had ever been inspected by any one for the purpose of ascertaining whether or not it contained any explosive substance.

"13. There is no evidence that the defendant or its agents had reason to believe that the barrel which exploded had ever been inspected by any one for the purpose of ascertaining whether or not it contained any explosive substance."

As to these rulings requested by the plaintiff, the presiding judge charged the jury: "I do not recall that there is any such evidence. The question back of that would be whether there was a duty to do that. If there was a duty to make such inspection, under the rules which I have stated, I am not aware of any evidence of performing it; but if there was no duty to make such an inspection, it makes no difference whether it did it or not."

The jury found for the plaintiff; and the defendant alleged exceptions.

R. Spring, (*W. Rand* with him,) for the defendant.

C. F. Choate, Jr., for the plaintiff.

HAMMOND, J. The plaintiff's theory of the cause of the explosion was that the "sole-laying cement" with which the barrel was filled when bought of the cement manufacturer by the R. H.

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Long Shoe Company, the shoe manufacturer, was composed of rubber dissolved in naphtha or gasoline; that when the barrel was sold as an empty barrel by the shoe manufacturer to the defendant, some of this solution still remained in the barrel; that when the heated tar was pumped by the plaintiff into the barrel through the bung hole, the naphtha or gasoline became vaporized; that the vapor escaping from the barrel and mixing with the air formed an explosive compound; that some of this compound reached and was ignited by the flame either of the gas jet fifteen feet distant from the barrel, or of the retort fire twenty-two feet distant; that there was a flash back from the flame to the barrel, and that when the flash reached the explosive mixture which was confined in the barrel the explosion occurred.

So much of this theory as respects the existence of the explosive mixture is comparatively free from difficulty upon the evidence, but that part which respects the manner in which the explosive mixture inside the barrel was reached by flame is not so clear upon the evidence. Upon this general theory the presiding judge charged the jury as follows:

"The way the explosion took place is a matter upon which you have heard the testimony and in which there is a great deal of difference in opinion. I think the witnesses agree that the explosion must have taken place in consequence of the application of fire to mixed gases somewhere there at the mouth of the barrel, in the bung hole of the barrel, in the barrel or outside the barrel, but how the fire could have reached that gas from the fires which were then burning in that room is a matter upon which there is a great deal of contest, the witnesses for the defendant claiming that it was impossible scientifically that it should have come either from the retort or from the gas jets. I do not recall the details of the testimony, but one of the witnesses * for the plaintiff said it could not have come from the gas jet, and another witness * for the plaintiff, while expressing his opinion that it might come from the gas jet, said it would be highly improbable."

While there is considerable difficulty in adopting the plain-

* The witnesses here spoken of qualified as experts.

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tiff's theory, still, if the jury believed the plaintiff as to the absence of every other flame than the gas jet and the retort fire, they may have come to the conclusion that this theory in the absence of any more plausible one furnished the most reasonable explanation of the explosion, not only as respects the manner in which the explosive mixture was formed, but also as to that in which it was touched by the flame. We cannot say as matter of law that such a finding was not warranted by the evidence.

It is stoutly maintained by the defendant that there was no evidence of its negligence. In support of this contention it is urged that the accident was a very singular one; that similar barrels had been bought by the defendant from the shoe manufacturer, and that no explosion ever had occurred in barrels so bought by the defendant; indeed, that Prentiss, the defendant's representative, never had heard of such an explosion and had no reason to suspect there was any possibility that such a thing could occur. The plaintiff on the other hand contends that the defendant was negligent in failing to inspect the barrel before placing it in the hands of the plaintiff for use.

Of course the defendant did not insure the safety of the barrel; its duty was, not to furnish an absolutely safe barrel, but simply to use due care to see that it was safe. Its duty was one of due care for the protection of a careful servant. It is doubtless true that there are many kinds of tools and materials which may be placed in the hands of a servant without any inspection whatever. Some may be harmless in their nature and construction, such as a broom or a nail; others may be so complicated that the ordinary purchaser is not expected to examine them but is justified in relying upon a respectable dealer from whom they are bought. In the class first above named there is no need of inspection; in the second class an inspection is impracticable. *Shea* v. *Wellington*, 163 Mass. 864. Whether there shall be an inspection and how careful it shall be are matters to be determined by the circumstances.

In the present case the defendant was buying not a new barrel, but a second hand barrel. It was one which was capable of holding fluids; and Jennings, the defendant's representative, may fairly be held to have known that fact. The barrel had contained one substance; he proposed to put into it another. He

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made no inquiry as to the nature of the substance, although as a man of general information he must have known that naphtha and other explosive materials are kept in barrels constructed water tight like the one in question. The only inspection he made was to see whether there was water in the barrel, but that inspection was made not because water might be dangerous to the servant, but because it was harmful to the tar. It was an inspection not for the protection of the servant, but in the interest of the master.

If inquiry had been made, it would have disclosed that the cement contained an inflammable substance; that by placing tar in the barrel under certain conditions likely to exist in the gas works, there was danger of an explosion injurious to life and limb. And such an inquiry as to the explosive nature of the cement easily could have been made.

While the case upon this branch is close, we think the jury may well have found that under the circumstances there was a duty on the part of the defendant to make an inspection, and that the injury to the plaintiff was the direct and proximate result of a failure to perform that duty.

It is further contended by the defendant that if there was any duty to inspect, it rested as well upon the plaintiff as upon the defendant. But that position is untenable. The plaintiff had the right to assume, until he saw some indication to the contrary, that whatever inspection was reasonably necessary to see that the barrel could be safely used by him had been made by the defendant, and that the only care he was expected to take was to see that there was no water in the barrel, and this not for his own protection but for that of the tar.

It follows that the ruling requested that on all the evidence the action could not be maintained was properly refused.

The hypothetical question put to the witness Blood was properly admitted. The defendant contends that the statement contained in the question that "two of the barrels had been filled and the third one was being filled," was not in accordance with the evidence. But it is to be observed that the evidence was not closed and the presiding judge could not know what on that point it might be at the close. As stated in *Anderson* v. *Albertstamm*, 176 Mass. 87, 91, "The jury are instructed to disregard

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the answers [to hypothetical questions] unless they find the facts as assumed in the questions; but as it cannot be known in advance what may be the ultimate decision of the jury as to the facts in dispute, the usual practice is to allow counsel in framing a hypothetical question, to assume the existence of such facts and conditions as the jury may have a right to find upon the evidence as it then is, or as there may be fair reason to suppose it may thereafter appear to be; and in determining whether a hypothetical question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be." It was within the discretion of the presiding judge to admit the question and the answer.

The witness Ordway was properly allowed to state what he had seen as to the liability of the naphtha sometimes to dry so as to leave a small amount in a barrel, and as to conditions of old barrels. The evidence had a tendency to show the action of the naphtha when left in the barrel in small quantities. True, the condition of other old barrels was remote and might well have been excluded, but it was all within the discretion of the presiding judge. The witness was also properly allowed to answer certain questions upon the assumption that two or three barrels had been filled before the one in question, for reasons already given as to the admission of the testimony of Blood.

The records of the Massachusetts General Hospital were properly excluded. The defendant does not contend that they were admissible under the common law, but insists that they are admissible under St. 1905, c. 330. But the records were made before that statute. The first section of the statute imposes upon certain hospitals, including, as we understand, the Massachusetts General Hospital, the duty "to keep records of the cases under their care and the history of the same in books kept for that purpose." The words "such records" in the second section embrace only the records which thereafter shall be kept under the first section. The question is not whether the statute is retroactive, as a rule of evidence or of procedure, in the sense in which those words are used in cases like *Stocker* v. *Foster*, 178 Mass. 501, and *Woodvine* v. *Dean*, 194 Mass. 40, as contended by the defendant, but rather what kind of records shall be ad-

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mitted. If the records are those described in the statute, then they are admissible without reference to the time of the trial, but if they are not of the kind described in the statute, then they are not admissible, no matter what may be the time of the trial. The records of the hospital were not those described in the statute, and were therefore inadmissible. This statute has since been amended (St. 1908, c. 269), but the case was tried before the amending statute became operative.

So far as respects the admissibility of the records of the Carney Hospital under St. 1905, c. 330, the same rule applies because these records also were made before it was passed. The defendant insists, however, that the records of this hospital are admissible under the common law. While it is true that the records were not made in accordance with a requirement of law and therefore were not legal records within the meaning of the rule that legal records or copies thereof are generally admissible, still it appears that they were made in the usual course of business by a person in the discharge of a duty, who appears not only as the maker of them but as their custodian. If she had died and her handwriting had been proved, in the absence of any other testimony as to the manner in which they were made up, they would have been admissible. As in the case of *Townsend* v. *Pepperell*, 99 Mass. 40, it would have been assumed that the records were of facts known to her. The rule applicable to such records ordinarily is that the entries must be made by a person having personal knowledge of the truthfulness of the statements. This test has been applied by this court in the case of shop books offered to prove delivery of goods, and it has been held that where the clerk who made the entries had no knowledge of the facts the entries are not admissible although the clerk testified that he correctly put down the information he received from the person by whom the delivery was said to be made. *Kent* v. *Garvin*, 1 Gray, 148. *Miller* v. *Shay*, 145 Mass. 162. It is true that this rule has not been applied with the same strictness to other memoranda. But in substance the general principle is the same. In the leading case of *Welsh* v. *Barrett*, 15 Mass. 380, 386, in which a bank messenger's memorandum of a demand and notice made by him in the course of his duty was admitted upon proof of his handwriting, he being dead, the principle was

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stated in these words: "What a man has said when not under oath may not, in general, be given in evidence when he is dead; because his words may be misconstrued and misrecollected; as well as because it cannot be known that he was under any strong motive to declare the truth. Yet there are well known exceptions to this rule, as in questions concerning pedigree. But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury." And the rule has been adhered to quite generally except where in the course of the business the clerk making the entry receives his information either orally or in writing from various persons whom he cannot expect to remember and whom it will be impracticable to call. To apply the rule in such a case and to require the evidence of every person in the long line of persons who have had anything to do with the transaction recorded, would be practically impossible, and so as a practical necessity the record is admitted upon the oath of the recorder, if alive, or upon proof of handwriting if he be dead. It is probable that this exception has been carried farther elsewhere than in this State. For a general discussion of the subject see Wigmore on Evidence, § 1530, and cases cited in the notes. In our own State this exception seems to have been recognized in *Briggs* v. *Rafferty*, 14 Gray, 525; *Adams* v. *Coulliard*, 102 Mass. 167.

In the present case the records were produced by the witness Gabagan. It appeared that the records were made by her, and that she was the proper custodian of them. But it further appeared that she never had any personal knowledge of the facts stated therein; that she received slips of paper from Dr. Painter, the physician, and copied them into the record; and that was all she knew about them. The record was offered as evidence to show that the statements therein made were true. As handed to the witness by the physician they were simply statements of the physician as to what the patient had said to him, or as to the diagnosis made by the physician. The records were comparatively recent. It was not shown that the physician was not living and within the jurisdiction of the court. No necessity was shown, therefore, for the introduction of this hearsay testi-

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mony. For aught that appeared there was better evidence. Under these circumstances the reason upon which the general rule was based, namely, that the record should be a record of facts of which the writer had personal knowledge, should be applied. The case is not within the above-mentioned exception to the general rule.

In this connection our attention has been called to the case of *Donovan* v. *Boston & Maine Railroad*, 158 Mass. 450, the defendant contending that it is like the present case and is authority for the admission of these records. In that case Barker, J., says (p. 453): "No entries were transferred to the despatcher's sheet [in Boston] from the sheet kept at the East Somerville station. As telegraphic messages are read by sound, as well as automatically recorded in symbols, these entries stand upon the same footing as if made from oral statements uttered at the indicated station, and audible in the despatcher's office; or, in view of the symbols in which the manipulation of his instrument by the operator who sends the message makes it visible at the receiving station, the entries are as if made from his signals given at East Somerville and visible in the despatcher's office. These entries are not, therefore, governed by the rule applied in the cases on which the plaintiff relies." After some discussion the ground of the decision is thus stated: "In our opinion, because there is no reasonable possibility that any designed untruth had part in placing upon the train sheet the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and because it was an act rather than a declaration, and was sufficiently identified as genuine, it was competent evidence without the production or proof of the death of the operator who sent the messages; and its entries material to the issue were admissible and proper for the jury to consider, notwithstanding the fact that it was made by the servants of the party by whom it was offered."

The difference between that case and the present is that the telegraphing and reading were regarded practically as one act, and it was more like a record of facts than of record of declarations made by another. The case must stand on its peculiar facts and cannot be regarded as authority for admitting these records. They were properly excluded.

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We see no error in giving the twelfth and thirteenth instructions requested by the plaintiff. The thirteenth instruction asked for by the defendant was properly refused. For reasons hereinbefore stated it could not be ruled, as therein requested, that there was no evidence from which the jury were entitled to infer that the defendant or its superintendent knew, or ought to have known, of the possibility of such an explosion.

Exceptions overruled.

HJALMAR A. NELSON, administrator, *vs.* CARL G. PETERSON.

Suffolk. January 20, 1909. — May 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Equity Pleading and Practice, Reservation by report. *Gift. Donatio Causa Mortis.*

Where in a suit in equity the judge who hears the case, after finding certain facts, dismisses the bill, and then reports the case for determination by this court upon the terms that such decree is to be entered "as justice and equity may require," it is the duty of this court to examine the facts and come to their own conclusion, giving due weight to the conclusion of the judge who heard the case.

In a suit in equity by an administrator to compel the delivery to him of property which had belonged to his intestate and which was claimed by the defendant, as the president and a trustee of a voluntary association of which the intestate was a member, by virtue of an alleged *donatio causa mortis* to the association, it appeared that the property of the intestate consisted of certain wearing apparel and $500 in money. Some of the wearing apparel was in a trunk and some of it was hanging in a closet of his room, which he occupied as a boarder. One morning he was very sick and knew it. Before leaving for the hospital, in which he died, he handed the key of the trunk to his landlady and said, "Here is the key of my trunk. Don't give it to anybody but the president, Mr. P., [the defendant] or the board of trustees. Give it to them." He also told her in substance that there was $500 in a pocket book in his trunk, that there was a dress suit that he intended should be used as his burial clothes, that there was some clean underwear which he wished the landlady to "pick out" for a similar or some other purpose and some shirts which his nephew might wear. The landlady said, "There is lots of clothes in the closet. Who will I give the trunk to and all that?" He said, "The society. They will take charge of everything. Do not give the key to anybody but Mr. P. or the board of trustees." The landlady said, "This ain't legal, Mr. L. You have to have it in black and white." He said, "Well, Mr. P. is to come to-night, and I will send him word to come to the hospital. . . . If I am not cremated, I want a little

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headstone put up, a grave and a headstone with perpetual care." The landlady said, "I guess there won't be much left after that." He said, "I don't want an expensive one, I want a little neat stone. What is left I want the society to have." The trial judge expressed the opinion that the evidence did not compel him to hold that the gift was incomplete. He ordered that the bill be dismissed, and reported the case to this court for such decree as equity and justice might require. *Held*, that, as the intestate did not intend to give to the society all of the clothing in the trunk nor all of the money, his delivery of the key of the trunk to the landlady was not intended to change the title to a part of the contents and therefore must fail as to the whole, and that there was no sufficient delivery of the clothes in the closet, what was said about them being rather a direction to hand them to the society than an indication of an intention to part at that time with the title, and, moreover, that it did not appear that the landlady agreed or supposed that she was acting for or in behalf of the defendant or the society in taking the key, but that it appeared rather that she intended to act and supposed she was acting to keep the property safely for the intestate, thinking that his estate could not be disposed of without a writing; consequently, that there was no delivery of any property sufficient to constitute a *donatio causa mortis*, and a decree was ordered for the plaintiff.

HAMMOND, J. This was a bill in equity filed by the administrator of the estate of Nils J. Liljestrom, deceased, to compel the delivery to him of personal property claimed by him to be estate of said Liljestrom, against the defendant, who holds and claims the property by virtue of an alleged *donatio causa mortis* to the Skandinaviska Föreningen, a voluntary association of which the plaintiff is president and a trustee, and of which Liljestrom was a member at the time of his death.

The trial judge* having found certain facts dismissed the bill; and the case is before us upon a report, such decree to be entered as justice and equity may require.

After stating the facts, the trial judge makes the following statement: "I do not think this evidence compels me to hold the gift incomplete. The burden seems to me upon the administrator, as the plaintiff. There is a possibility Liljestrom contemplated doing something further. It is also possible he did not."

Inasmuch as this is a proceeding in equity and is before us upon facts found, and by the terms of the report such decree is to be entered as justice and equity require, it becomes our duty to examine the facts and come to our own conclusion, giving due weight to the conclusion reached by the trial judge.

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* *Wait*, J.

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We have carefully studied the facts and do not think they show a completed *donatio causa mortis*. The most that can be said is that they indicate a desire upon the part of Liljestrom that after certain of his property had been disposed of for funeral and burial purposes, the rest should go to the society represented by the defendant. He evidently was thinking of his whole estate and of its future disposition, and not simply of certain specified articles out of his estate.

But however that may be, there was no sufficient delivery. In this class of gifts, as in gifts *inter vivos*, there must be a delivery, a change of possession, which must be made for the purpose of passing the title *in præsenti*. The donor's title must pass and such must be the intention. The only difference in this respect between the two classes of cases is that where there is a gift *inter vivos* the change in the title is irrevocable and indefeasible, while in the case of a gift *causa mortis* the change is revocable and defeasible upon certain conditions. See *Harvey* v. *Duryea*, 183 Mass. 433, and the authorities there cited.

There is no evidence that before the death of Liljestrom he made any delivery to the defendant, but it is contended that a delivery was made to Mrs. O'Shea as the defendant's representative by his handing to her the key of the trunk containing some of the articles, and because she, after Liljestrom's death, handed the key and the trunk and other articles to the defendant. It is true a delivery need not be made to the donee, but may be made to some third person for him; and if after the death of the donor this person delivers the subject of the gift to the donee who accepts it, that is sufficient delivery.

The property of Liljestrom consisted of certain wearing apparel and $500 in money. Some of the wearing apparel was in the trunk and some was hanging up in the closet of his room which he occupied as a boarder in Mrs. O'Shea's house. The acts relied upon to show delivery took place on a Monday morning. Liljestrom was very sick and knew it. Before leaving his boarding house for the hospital "he handed her the key to his trunk and said: 'Here is the key to my trunk. Don't give it to anybody but the president, Mr. Peterson, or the board of trustees. Give it to them. There is $500 in a pig skin pocket

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book in my trunk rolled up in my pants, and if anything happens to me there is a dress suit I am going to put on, and there is some clean under-wear and you can pick it out.' Mrs. O'Shea said, 'I hope there won't be nothing happen.' He replied, 'No, but you can never tell. There is some shirts there I suppose my nephew can wear.' Mrs. O'Shea said, 'Oh, there is lots of clothes in the closet. Who will I give the trunk to and all that?' He said, 'The society. They will take charge of everything. Do not give the key to anybody but Mr. Peterson or the board of trustees.'

"He also handed her two dollars as a gift to herself; told her he gave her husband a small basket of tools, and gave her his silver watch and told her to take the watch and key to her own room and keep them till the president or board of trustees came and then give them to them. Mrs. O'Shea at the moment was brushing a coat for him to wear away and instead of taking the key, or after taking it, asked him to put it in a place she indicated, whence she subsequently took it. Mrs. O'Shea said to him, 'This ain't legal, Mr. Liljestrom. You have to have it in black and white.' He said, 'Well, Mr. Peterson is to come to-night, and I will send him word to come to the hospital. If he comes here you send him to the hospital. You can't tell what will happen.' Liljestrom said, 'If I am not cremated, I want a little headstone put up, a grave and a headstone with perpetual care.' Mrs. O'Shea said, 'I guess there won't be much left after that.' He said, 'I don't want an expensive one, I want a little, neat stone. What is left I want the society to have.'"

It is very plain that he did not intend that the society (whom the defendant represents) should have all the things in the trunk. He intended that upon his death the dress suit should be used as his burial clothes, that the "clean under-wear" should be "picked out" by Mrs. O'Shea either for a similar or some other purpose, and that his nephew might have some of the shirts to wear. None of these things, although in the trunk, were to go finally to the society. Nor did he intend that the whole of the money should go to it. Unless cremated he wanted a "little headstone put up, a grave and a headstone with perpetual care."

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All this is inconsistent with the theory that he was then transferring to the society all his right and title to the clothes in his trunk. The delivery of the key of the trunk to Mrs. O'Shea could not therefore have been done with the intention of transferring to the society these articles as their property. And in view of all the circumstances of the case we are constrained to the view that the delivery of the key not being sufficient to change the title to a part of the contents must fail as to the whole. Nor was there sufficient delivery of the clothes in the closet. What was said about them was rather a direction to Mrs. O'Shea to hand them to the society than an indication of an intention to part then and there with the title.

Moreover it does not seem to us that Mrs. O'Shea agreed or supposed she was acting for or in behalf of the defendant or the society in taking the key. She certainly did not suppose that Liljestrom's purposes as to the disposition of his estate could be carried out without a writing, and we think she intended to act and supposed she was acting to keep the property safely for him rather than for the society. See as bearing somewhat on the question discussed in this case *Marshall* v. *Berry*, 13 Allen, 43, 46, and cases there cited, *McGrath* v. *Reynolds*, 116 Mass. 566, and cases there cited.

Decree for the plaintiff.

The case was submitted on briefs.

V. E. Runo, for the plaintiff.

W. A. Thibodeau & G. L. Ellsworth, for the defendant.

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AMERICAN BRIDGE COMPANY OF NEW YORK & another *vs.* CITY OF BOSTON.

Suffolk. January 21, 1909. — May 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Assignment. Damages, Recoupment.

In an action to recover the amount due to a contractor upon an architect's certificate under a contract with the defendant for the construction of a building, brought by an assignee of the contractor under an assignment in writing, of which the defendant received notice, the defendant may recoup any damages which he has suffered before the date of the writ from the breach and abandonment of the contract by the plaintiff's assignor, although at the time that the defendant received notice of the assignment the full amount named in the certificate was due and payable to the plaintiff and at that time the plaintiff's assignor had committed no breach of the contract.

CONTRACT by the American Bridge Company and the Central National Bank under and by virtue of two assignments made by F. G. Coburn of all moneys coming due to Coburn under two contracts with the city of Boston dated respectively July 16, 1901, and August 27, 1901, for the construction of two buildings for the City Hospital. Writ dated October 30, 1906.

The action was brought to recover the amount of two architect's certificates dated November 10, 1902, for the sums of $2,210 and $3,085.50. The case was referred to Carleton Hunneman, Esquire, as auditor, who found for the defendant. Afterwards the case was heard by *Sanderson*, J. The only evidence presented was the auditor's report and the exhibits thereto annexed.

The assignments were dated April 10, 1902, when the buildings were in the course of construction. Notice in writing of the assignments was given to the defendant on November 14, 1902. A short time after this Coburn abandoned the work. The defendant asked the judge to make the following ruling: "The defendant is entitled to set off or recoup against the sum certified by the architects on November 10, as due F. G. Coburn and Company any set-offs or recoupments in its favor arising out of the contracts whether before or after November 10, 1902."

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The judge refused to make this ruling. He found for the plaintiffs in the sum of $7,164.81; and the defendant alleged exceptions.

G. A. Flynn, for the defendant.

J. B. Studley, for the plaintiff.

HAMMOND, J. This is an action of contract brought by the plaintiffs as assignees of all "the moneys now due or which may hereafter become due" to one Coburn, the assignor under two certain building contracts between him and the defendant, dated respectively July 16, 1901, and August 27, 1901. It is brought to recover the amount of two architect's certificates, one for $2,210 and the other for $3,085.50, each dated November 10, 1902. The case was heard upon the auditor's report (which was for the defendant) and certain exhibits, by a judge of the Superior Court, sitting without a jury, who found for the plaintiffs for the full amount claimed; and it is before us upon exceptions taken by the defendant.

These exceptions raise the general question whether in this action the defendant may recoup for the damages sustained by the default of the assignor, which occurred after the defendant had notice of the assignment.

It is contended by the plaintiffs that these sums were due and payable at the time the defendant received notice thereof, that the plaintiffs' rights were fixed at the time of notice and could not be changed by the act of the assignor or of the defendant after notice, and consequently that the damages caused to the defendant by the default of the assignor in leaving his contract unperformed, although without any fault or collusion on the part of the defendant, cannot be recouped in this action. It is contended that the only remedy open to the defendant is by way of an action against the assignor.

Even if it be conceded in favor of the plaintiffs that the sums were due and payable at the time of the notice, and that the rights of the plaintiffs were fixed at that time, still the conclusion which the plaintiffs seek to draw by no means necessarily follows.

We are dealing not with the right of set-off, but with that of recoupment, — an entirely different right. The one is a creation of statute, the other exists at common law and not by statute;

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the one is applicable even where there are different contracts, the other arises only out of the same contract as that under which the claim of the plaintiffs arises. Confusion sometimes has been caused by a neglect to note the distinction between these two rights. The principles applicable to a case of set-off are in many respects different from those applicable to a case of recoupment, and some care is required not to be misled by apparent analogies.

The assignment of a chose in action conveys, as between the assignor and assignee, merely the right which the assignor then possesses to that thing; but as between the assignee and the debtor it does not become operative until the time of notice to the latter, and does not change the rights of the debtor against the assignor as they exist at the time of the notice.

It becomes necessary to consider the exact relation between the defendant and Coburn, the assignor, at the time of the notice. The auditor has found that written notice of the assignments was given to the defendant on November 14, 1902, before the service of any trustee process. At that time there does not seem to have been any default on the part of Coburn. At the time of the notice what were the rights between him and the defendant, so far as respects this contract? He was entitled to receive these sums, but he was also under an obligation to complete his contract. This right of the defendant to claim damages for the non-performance of the contract existed at the making of the contract and at the time of assignment and of notice, and the assignees knew it, and they also knew that it would become available to the defendant the moment the assignor should commit a breach. Under these circumstances it must be held that the assignees took subject to that right. Coburn, the assignor, abandoned the work in a few days after the notice. This action was not brought until October 30, 1906, nearly four years after the breach.

Even if the sums were due and payable in November, 1902, at the time of the notice, still if this action had been brought by the assignor after the default, there can be no doubt that the defendant would have had the right to recoup the damages suffered by his default. And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor.

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The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge; and, since they have delayed suit for these sums until after default, the defendant may recoup against them as it could have recouped against the assignor. It cannot without its own fault or consent be deprived of rights under the contract. Any other conclusion would make the contract different from that into which the defendant entered. The case is very similar to *Rockwell* v. *Daniels*, 4 Wis. 432, in the reasoning of which we fully concur. See also *Government of Newfoundland* v. *Newfoundland Railroad*, 13 App. Cas. 199. We see nothing in *First National Bank* v. *Perris Irrigation District*, 107 Cal. 55, or *Wilkinson* v. *Clements*, 42 L. J. Ch. (N. S.) 38, cited by the plaintiffs, which changes our view. They seem to proceed upon the principle of separate contracts.

Exceptions sustained.

EMILY A. BENTSON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

CARL J. BENTSON *vs.* SAME.

Suffolk. March 10, 11, 1909. — May 24, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Due care of plaintiff. *Elevated Railway.*

A woman, who at a station of an elevated railway attempts to enter the side middle door of a car, being familiar with the working of such car doors and knowing that the door is likely, upon a given signal, to be closed by a man standing where he cannot see her to warn her after it has begun to close, and in thus attempting to enter pays no attention to ascertain whether the signal has been given or the door has begun to close before she steps on the car, is not in the exercise of due care, and, if her leg is struck by the door of the car, which had begun to close before she began to enter, she cannot recover from the corporation maintaining the car for her injuries thus caused.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries received on May 8, 1905, from being struck by an automatic door of a car on the defendant's elevated railway at

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its Dover Street station in Boston, while the plaintiff was attempting to enter the car, and the second by the husband of the plaintiff in the first case for loss of her services by reason of such injuries. Writs dated respectively January 6, 1906, and July 15, 1907.

In the Superior Court the cases were tried together before *Brown*, J., who at the close of the plaintiffs' evidence ordered a verdict for the defendant in each of the cases. The plaintiffs alleged exceptions.

P. M. Keating, for the plaintiffs.

E. P. Saltonstall (*S. H. E. Freund* with him,) for the defendant.

HAMMOND, J. While the plaintiff in the first case with her child was in the act of entering the side door of one of the defendant's cars, the door in shutting struck her leg and injured her.

The case is somewhat close, but we do not think the evidence warranted a finding that the plaintiff was in the exercise of due care. She testified that she had ridden on the cars of the defendant for several years, and that she was familiar with the cars and knew about them; that she knew that "people were ordinarily supposed to get off by the centre door, . . . in the side of the car, and to get on by the . . . [end doors]"; that she knew it would be more difficult for her to get into the door where the people were getting out than it would be for her to go to the end door and get on. She further testified that she knew the doors were automatic doors and were closed by a man standing between the cars, and that after the gong had been sounded to start the train there was no other warning given that the doors were about to close. She also testified that she was not waiting for any signal of that kind but simply "followed the rest of them," that she had no thought in regard to the door, that she did not look at all before she got on the car to see whether the door had begun to close and that she knew nothing about the door until she felt it pressing against her leg. She stated that she followed two or three people ahead of her, and that nobody was pushing or shoving; and that there was "nothing ahead of her to prevent her getting in until the door struck her"; that she "didn't rely in any way, one way or the

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other, on the fact that people were getting into the car, as to whether or not the door was closing"; and that she had been to other stations of the defendant and had seen "them close the doors when the people were coming up in a steady stream when it came time to close the doors, and the person nearest to the door had to wait for the next train."

It is unnecessary to recite the evidence more in detail. The plaintiff was familiar with the working of the car doors; she attempted to enter a car which she knew was liable to be closed, at a given signal, by a man standing where he could not see her to warn her after it had begun to close; and she attempted to do this without paying any attention as to whether the signal had been given or the door had begun to close before she began to step on the car. It is plain that the door had begun to close before she began to enter, and that if she had paid the least attention to its movements she would have seen that movement. On this question of the due care of the plaintiff the case is materially different from *McGarry* v. *Boston Elevated Railway*, 195 Mass. 538, *Kelly* v. *Boston Elevated Railway*, 197 Mass. 420, and cases there cited, and *Hilborn* v. *Boston & Northern Street Railway*, 191 Mass. 14.

It becomes unnecessary to consider the question whether there was evidence of the negligence of the defendant. The second case must fall with the first. In each case the order must be

Exceptions overruled.

COMMONWEALTH *vs.* CARDENIO F. KING.

Suffolk. March 24, 1909. — May 24, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Criminal, Statement of particulars. *Larceny. Pleading, Criminal,* Indictment. *Words,* "Steal," "Embezzles or fraudulently converts."

Upon an indictment for larceny in thirty-one counts, the defendant filed a motion asking for a statement of particulars as to the nature and ground of each of the several crimes charged against him "whereby it shall be made to appear, and the defendant shall be apprised, whether the Commonwealth so in each count of said indictment has specifically charged and alleged the crime of embezzlement, or obtaining money by criminal or false pretenses, or larceny." The Common-

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wealth filed a statement of particulars, in which, besides giving sufficiently full information about all matters of fact as to which the defendant desired information, it notified him, that in each and all of the counts it asked for a conviction on the ground that he had committed each one of the crimes of larceny, embezzlement and obtaining money through false pretenses, and also in some of the counts the fourth crime of embezzlement or fraudulent conversion as a broker described in R. L. c. 208, § 47. The defendant objected to the statement and moved to have it expunged from the record and that further specifications be furnished by the Commonwealth. The motion was denied. *Held*, that the denial of the motion was proper, as the defendant could suffer no injury from being notified in advance of the demand of the Commonwealth, whether well founded or not, for a conviction, under each count for a single larceny, on proof of larceny proper or embezzlement or obtaining money under false pretenses, or, under some of the counts, of the crime of embezzlement or fraudulent conversion as a broker.

The provision of R. L. c. 218, § 39, that a defendant indicted for larceny may apply for a bill of particulars "as to the crime which he is alleged to have committed," does not give him an absolute right to require such a statement, the granting of such a motion being within the discretion of the court.

An indictment for larceny which varies from the statutory form set forth in the schedule appended to R. L. c. 218 only by giving further information to the defendant, and which contains a full, formal and complete charge of larceny and does not charge the defendant with the commission of any other crime, is sufficient in law, and a motion to quash it must be denied.

Under the provisions contained in R. L. c. 208, § 26, taken in connection with those contained in R. L. c. 218, §§ 38–40, the former crimes of larceny, embezzlement and the obtaining of property by false pretenses now are merged into one crime of larceny as described in those statutes, which may be proved by evidence that would have warranted a conviction upon any one of the three charges that formerly would have been needed, and accordingly upon the trial of an indictment for larceny the Commonwealth cannot be required to elect which of the three former crimes it will prove.

Whether the crime of embezzlement or fraudulent conversion by a broker described in R. L. c. 208, § 47, is included in the crime of larceny as described in R. L. c. 208, § 26, and R. L. c. 218, §§ 38–40, or whether it is a separate crime, here was not passed upon, because at the trial of the indictment for larceny at which the question was raised, the jury convicted the defendant upon instructions from the presiding judge, under which they could not have returned their verdict without finding facts which showed the defendant to have been guilty of embezzlement independently of R. L. c. 208, § 47, but it was intimated that it might be that the last named section should be treated as simply creating a new statutory kind of embezzlement to be included in larceny.

At the trial of an indictment for larceny the defendant asked for rulings that there was no evidence which would warrant a conviction on the ground that he had obtained money by criminal false pretenses and no evidence, except under a certain count, which would warrant a conviction of larceny at common law. The requests were refused and the defendant was convicted. There was evidence on which the jury would have been warranted in finding that the defendant had sustained a very great loss in starting and attempting to maintain a newspaper; that his regular business of selling certain particular securities had come to an end and he was sorely in need of obtaining some ready money; that he thereupon published highly flaring and sensational advertisements, well adapted to attract

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the attention and gain the confidence of credulous people, advising the purchase of certain stocks, not upon margin, but upon full payment of the price, and offering upon receipt of the necessary money to make such purchases for customers without profit to himself; that he had an expensive establishment to maintain and did not cut it down or curtail his expenses; that he received large sums of money, with directions to buy particular stocks, but failed to buy them, put off his customers with false excuses, and converted the money to his own use, guarding it against attachment by putting it into the form of certificates of deposit. There also was evidence that either he, or his agents by his instructions, had made to some customers false and misleading statements by which they were induced to send or to pay to him money for stocks which it was falsely represented had been bought for them. *Held*, that there certainly was evidence for the jury on the question of false pretenses; and that the jury also might find from the defendant's advertisements, his methods of business and correspondence with his customers, his false statements as to the purchases which he said that he had made, his false excuses for the non-delivery of stocks which he should have purchased but had not purchased, and his conduct as to the overpayments which many of his customers had made in advance, that his whole scheme was a fraud from the beginning, that his possession of the money and other property of his customers had been obtained by mere trickery with the present intent to convert it to his own use, that he had no rightful possession, and that the delivery to him was made without any intent to pass the title but merely to enable him to make the specific use of the money which was directed, so that in appropriating it he was guilty of larceny at common law.

INDICTMENT, found and returned in the county of Suffolk on April 11, 1908 in thirty-one counts for larceny, as described in the opinion.

On December 3, 1908, the defendant filed a motion for a statement of particulars. On December 9 the Commonwealth by the district attorney filed a statement of particulars, and on the same day the defendant filed a motion that the Commonwealth's statement be expunged and discharged from the records, and that the court order and direct the Commonwealth to file further particulars and specifications as requested by the defendant in his motion filed on December 3. On December 14 this motion of the defendant was denied by *Schofield*, J.; and the defendant appealed from the order.

On December 15 the defendant was placed on trial before *Schofield*, J. The defendant filed a motion to quash the indictment, which was denied by the judge. The defendant excepted to the order. At the close of the evidence for the Commonwealth the defendant rested, without offering any evidence, and asked the judge to compel the Commonwealth to elect upon

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which of the offenses, alleged to be set forth in the Commonwealth's specifications as to each count, it asked a verdict. The judge refused to require the Commonwealth to make such an election and ruled that if under any count the jury were satisfied under the rules of evidence that either of the offenses embodied in the general phrase "larceny" had been committed the defendant might be convicted on such count. The defendant excepted.

The defendant thereupon presented twenty-seven requests for instructions, of which nine were given in a form satisfactory to the defendant and two were waived. To the judge's refusal to give the remaining instructions requested and to all portions of the charge inconsistent with the rulings requested the defendant excepted.

On the sixth, twentieth and twenty-eighth counts the Commonwealth offered no evidence. On these and on the twenty-second count, on which evidence was offered, a verdict of not guilty was returned by order of the judge. On each of the remaining twenty-seven counts the jury returned a verdict of guilty; and the defendant alleged exceptions.

The verdict was returned on December 30, 1908. On January 13, 1909, the defendant filed a motion in arrest of judgment. The motion was denied, and the defendant appealed from the order. On the same day the defendant was sentenced to imprisonment in the State prison for a term of not more than fourteen years and not less than ten years. The defendant moved for a stay of execution, and his motion was denied.

H. Parker, (*H. L. Baker & C. F. Rowley* with him,) for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth, submitted a brief.

SHELDON, J. The first question presented in this case is whether there was any error in law in the action of the Superior Court in denying the defendant's motion that further specifications be furnished by the Commonwealth, and that the specifications which upon his previous request already had been filed, should be expunged and discharged from the record. The defendant had been indicted in thirty-one counts, apparently for as many separate larcenies. He had filed a motion asking for a

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statement of particulars as to the nature and ground of each of the several crimes charged against him, as to the means by which the crimes were alleged to have been committed, and as to the exact nature of the property referred to and described in each count. He also in the same motion "requires and requests more specific particulars and recitals" in each of the counts "as to the specific crime" which he was alleged to have committed, and asked that the Commonwealth be required to set forth the specific crime charged in each count, "whereby it shall be made to appear, and the defendant shall be apprised, whether the Commonwealth so in each count of said indictment has specifically charged and alleged the crime of embezzlement, or obtaining money by criminal or false pretences, or larceny." The district attorney thereupon, without any formal order of the court, filed specifications, stating in substance that the Commonwealth specified that the defendant did "embezzle and fraudulently convert to his own use" certain described money and property, which had been delivered by the person named upon the trust and confidence that it should be used by the defendant in the manners specifically stated; and further, that the defendant had obtained a check and order for money from the same person by means of certain "false and fraudulent representations" set forth in detail; and further that the defendant "did feloniously steal, take and carry away" certain money and other property named; and further, as to some only of the counts, that the defendant being a broker engaged in the business of buying and selling stocks, bonds, and securities and having been intrusted by the person named with certain money, with directions in writing to invest said money in certain named stocks for and in behalf and in the name of that person, did in violation of good faith and contrary to the terms of such direction, "embezzle and fraudulently convert to his own use" said money. That is, the Commonwealth, besides giving sufficiently full information about all matters of fact as to which the defendant desired information, also notified him, in answer to his request that he be informed as to the crime which he was alleged to have committed, that as to each and all of the counts it asked for a conviction on the ground that he had committed each one of what he contends are the three distinct crimes of larceny, of embezzle-

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ment, and of obtaining money through criminal false pretences, and (as to some of the counts) the fourth crime of the statutory embezzlement described in R. L. c. 208, § 47.

It would be a sufficient answer to the contentions of the defendant upon this question to say that he did not suffer by the refusal of the court to order further specifications or to expunge those which already had been filed. There is no contention that he was denied any information which he had a right to require. His complaint is rather that the Commonwealth gave him warning that it would make a demand which it would have (as he contends) no right to make, i. e., that it would ask for a conviction as to each count for a single larceny upon proof of larceny proper, of embezzlement, of obtaining money by criminal false pretences, or, as to some of the counts, of the particular crime of embezzlement or fraudulent conversion by a broker. He suffered no injury by being notified in advance of this demand of the Commonwealth, whether the demand was or was not well founded.

It is to be observed also that the bill of particulars for which a defendant is allowed by the last sentence of R. L. c. 218, § 39, to ask is not one which he may require as of right. The first sentence of that section does give him an absolute right to require "a statement of such particulars as may be necessary" to give him "reasonable knowledge of the nature and grounds of the crime charged," if that charge would not be otherwise "fully, plainly, substantially and formally set out." *Commonwealth* v. *Snell*, 189 Mass. 12, 19. *Commonwealth* v. *Sinclair*, 195 Mass. 100. *Commonwealth* v. *Bailey*, 199 Mass. 583, 585. Except as modified by this provision it still is, as it formerly was, in the discretion of the court to say whether any and what bill of particulars shall be furnished to him. *Commonwealth* v. *Wood*, 4 Gray, 11. *Commonwealth* v. *Giles*, 1 Gray, 466, 469. The change from "shall" to "may" in the statute cannot be treated as without significance, however either word might be construed if it stood alone. See *Cheney* v. *Coughlin*, 201 Mass. 204. There is no ground for saying that these specifications did not give the defendant full knowledge "of the nature and grounds of the crime charged" against him; and the presiding judge was not bound to expunge at his request any part of those specifications, or to

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require new or further particulars or specifications to be furnished to him. But the questions which the defendant has sought to raise upon this branch of the case are all open and will be considered upon the exceptions which he saved at the trial. The exceptions to the order of the court denying this motion of the defendant must be overruled, and the order appealed from must be affirmed.

The motion to quash the indictment could not have been sustained. So far as the several counts thereof vary from the statutory form set forth in the schedule appended to R. L. c. 218, it is only by giving further information to the defendant. Each one of them contains a full, formal and complete charge of larceny. Neither one of them contains anything more, or charges the defendant with having committed any other crime. Whether a conviction could be had under such counts by proof of anything else than a technical larceny at common law, or whether evidence offered under them tending to show a larceny prohibited by our statutes would be made incompetent by the fact that it might tend to show also the commission by the defendant of any other crime, were questions which might in any case, as they did in this case, arise at the trial, and would then have to be passed upon; but the fact that such questions might arise furnished no ground for quashing the indictment. Whether or not the Commonwealth could at the trial ask for a general verdict of guilty, on each count on whichever one of three or four different contentions the jury might find to have been proved with the requisite degree of certainty, yet each count did contain a proper charge of larceny in any one of its forms. *Commonwealth* v. *Kelley*, 184 Mass. 320. As was said by Hammond, J., in the case last cited, the word "steal" has become "a term of art and includes the criminal taking or conversion" by way either of larceny, embezzlement or obtaining by false pretences. The exceptions to the order of the court denying the defendant's motion to quash the indictment must be overruled and the order must be affirmed. *Commonwealth* v. *Bailey*, 199 Mass. 583. *Commonwealth* v. *Sinclair*, 195 Mass. 100, 105.

The defendant's exception to the exclusion by the judge of his statements to the witness Gilmore as to how much the defendant had paid to other creditors with whom he had settled,

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or as to how he was dealing with other creditors, has not been specifically argued. We see no error in this ruling. The defendant's counsel in his able argument has not contended that this evidence was competent.

The defendant did not put in any evidence, but at the close of the Commonwealth's case asked the judge to require the Commonwealth to elect "which of the three or four specific statute or common law offences alleged to be embodied in each count [was] the crime or offence" upon which it asked a verdict. But the judge refused to do this, and ruled that the crime of larceny could be committed in different ways, viz.: by embezzlement; by obtaining money by false pretences; and also by the taking and carrying away of personal property by trespass out of the possession of the owner, that is, by larceny at common law; and that the defendant could be convicted upon each count if it was satisfactorily proved as to that count that he had committed the crime of larceny therein charged, whether he had committed it in one or another of these different modes. And the jury were not in terms forbidden to convict upon some of the counts upon which a verdict of guilty was returned, upon proof that the defendant, being a broker engaged in the business of buying and selling stocks, bonds and securities, and having been intrusted by the persons named in those respective counts with money, with the direction in writing to invest the same in the stocks or securities named for and in the names of those persons, did in violation of good faith and contrary to the terms of the direction, embezzle and fraudulently convert to his own use such money. That is, as to these counts, so far as has yet appeared, the jury may have convicted the defendant of larceny upon proof of the peculiar kind of embezzlement described in R. L. c. 208, § 47, although, as we shall hereafter see, the actual rulings made on this subject were such that there could not have been a conviction on the ground of embezzlement without a finding of facts which would establish an embezzlement by any agent, whether technically a broker or not. One of the most important questions in this case is whether these rulings were correct.

The learned counsel for the defendant has argued this question on the assumption that the effect of these rulings, as applied

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to the indictment and the specifications filed thereunder, was to charge the defendant in each count with having committed at least three separate crimes, and to allow him to be convicted upon proof of any one of those crimes, without being advised in any manner what was the specific crime with which he was charged, or which one of the different and distinct crimes embraced within the scope of the indictment was the one upon which the Commonwealth asked for a verdict against him: and that it is now impossible, upon the face of this record, to say for what offences he has been convicted and should have been sentenced. He contends that the St. of 1899, c. 409, now contained in parts of R. L. c. 218, was a statute prescribing rules of pleading and practice, but not affecting in any way the identity of the crimes to be charged in an indictment. Especially he contends that the distinct identity of the several crimes of larceny, embezzlement, and false pretences now classed under the general head of larceny is not affected by §§ 38, 39 or 40 of R. L. c. 218; that the statute does not create a new crime of larceny or operate the merger of the other crimes above named in the crime of larceny, but that each retains its independent existence as a distinct crime; that, as was said in *Commonwealth* v. *Kelley*, 184 Mass. 320, 324, 325, "the statute neither creates a new crime nor in any way changes one existing at the time it took effect; nor does it increase or in any way affect the punishment for any crime. . . . It relates purely to the matter of technical pleading as to the words to be used in setting forth a criminal act." This may be true, so far as the effect of the statute referred to taken merely by itself is concerned. But it does not stand by itself. By another statute originally passed in the same year, St. 1899, c. 316, § 1, now substantially contained in R. L. c. 208, § 26, it was provided that "whoever steals or, with intent to defraud, obtains by a false pretence the money or personal chattel of another, or whoever unlawfully and with intent to steal or to embezzle converts to his own use or secretes with intent to convert to his own use the money or personal chattel of another, whether such money or personal chattel is or is not in his possession at the time of such conversion or secretion, shall be guilty of larceny, and may be indicted and punished for that crime." The effect of this statute, certainly when taken in

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connection with the provisions of the statute now contained in R. L. c. 218, §§ 38, 40, is to put it beyond a doubt that the former crimes of larceny, embezzlement, and the obtaining of property by false pretences, are now merged into the one crime of larceny as defined by those statutes. It may still remain true, as was in fact ruled in the case before us, that the same evidence is required now to convict of this statutory crime of larceny upon proof of either one of the three crimes that now constitute this offence, that formerly would have been required to convict upon charges of those respective crimes, taken each by itself. But it is none the less true that the crime of larceny as now established under R. L. c. 208, § 26, does include within itself what were formerly the three crimes that have been mentioned, and may be proved by evidence which would have warranted a conviction upon any one of the three charges that formerly would have been needed. It must be borne in mind also, that the act for the simplification of criminal pleadings, c. 409 of the St. of 1899, was passed after the passage of the other act, c. 316 of the acts of the same year, and was approved by the Governor nearly a month after the passage and approval of the other act; so that the Legislature in passing the later act must be taken to have had the provisions of the earlier one in mind, and to have intended both acts to operate as parts of one harmonious whole. This is perhaps the reason why an especial permission to ask for a bill of particulars was given in the later act to one indicted for the crime of larceny. R. L. c. 218, § 39. This legislation was intended to do away with the possibility of a criminal indicted for one of the three crimes mentioned escaping punishment by reason of its being afterwards found that his crime was technically one of the other two mentioned. A typical case of this kind is *Commonwealth* v. *O'Malley*, 97 Mass. 584. In that case the defendant had obtained by a trick possession of the money of an ignorant woman for a temporary purpose, and had fraudulently converted it to his own use. He had been prosecuted for larceny, but had obtained an acquittal because the judge before whom he was tried believed his crime to have been embezzlement. He was then indicted for embezzlement, and was convicted. But it was held by this court that his offence was really larceny and not embezzlement, and he was thus

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enabled wholly to escape punishment. It was the object of the Legislature to prevent for the future similar scandals in the administration of justice, by doing away with the merely technical difference between three cognate and similar offenses. The only way in which this reformatory intent can be effectuated is to allow the jury, upon the material facts which are the ground of a charge of larceny, to consider whether these facts show a taking of money or other property, by trespass from the possession of its owner, a fraudulent conversion of it while properly in the possession of the wrongdoer, or an obtaining of it by criminal false pretenses, — in either case, of course, accompanied by the necessary criminal intent, — and in either of these cases to convict of the larceny. To require the Commonwealth to elect in such a case would be to continue to afford an opportunity to frustrate the ends of justice, just as was done in *Commonwealth* v. *O'Malley*, *ubi supra*.

It is of course not meant by what has been said to imply that upon an indictment or a count for a single offense the Commonwealth may offer evidence of independent transactions, or of more than one action or set of actions done either at the same or at different times, and leave it to the jury to say which, if either, of the transactions was proved and which should be made the ground of a conviction. *Commonwealth* v. *Wyman*, 8 Met. 247. *Commonwealth* v. *Symonds*, 2 Mass. 163. Nor could any specifications be framed which would enable a prosecuting officer to take such a course. The charge is a single one, of a single offence, and the proof is to be limited accordingly. *O'Connell* v. *Regina*, 11 Cl. & Fin. 155, 241. *Commonwealth* v. *Holmes*, 119 Mass. 195, 198. *Commonwealth* v. *Bennett*, 118 Mass. 443, 453. There is nothing in either of the statutes which we have been considering that changes this salutary rule of law. Nor was it in any degree violated in the trial of the case before us. The only doubt that could be raised upon this question arises upon the language used by the district attorney in framing his specifications, by adopting a form which at first sight might have seemed to be open to the interpretation that three or more different sets of circumstances were relied upon under each single count to support the three separate inferences of fact by which the guilt of the defendant might be found to have been either

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larceny, strictly so called, embezzlement, or an obtaining by false pretenses. It was manifest, however, upon closer inspection, and abundantly appeared at the trial, that the object aimed at in the specifications was not only, as the statute imperatively required, to set forth the nature and grounds of the charge, but also to warn the defendant of the claim to be made by the prosecution that what he had done would warrant his conviction upon either one of the three grounds specified in R. L. c. 208, § 26. If the defendant or his counsel had been in any respect mistaken in their interpretation of the specifications furnished, and so had been taken by surprise by any of the evidence offered or any of the contentions made by the Commonwealth, the presiding judge no doubt would have given them whatever time was needed to meet the case made by the prosecution; but no suggestion of this kind was, or, so far as we can see, could have been, made in behalf of the defendant.

But it is said that the defendant, as to some of the counts upon which the jury returned a verdict of guilty, may have been convicted upon the specifications which charged him with embezzlement as a broker under R. L. c. 208, § 47, and that this species of embezzlement, or fraudulent conversion by a stock-broker of the money of his customer, is not properly within the purview of the crime of larceny as described in § 26 of the same chapter, or as used in R. L. c. 218, §§ 38–40. We do not decide that this contention would be well founded in any event, especially in view of the fact that we have heretofore held that one who has been guilty of the specific offense described in R. L. c. 208, § 48, may be indicted, convicted and sentenced for larceny under the statutes already referred to. *Commonwealth* v. *Kelley*, 184 Mass. 320. And if it were necessary to consider this question, much might be said for the position that § 47 of R. L. c. 208 must be treated as simply creating a new statutory kind of embezzlement, by providing that such a broker as is therein described may, under the circumstances stated, be held for the embezzlement or fraudulent conversion of the money or securities of his customers, even though, by the custom of the trade, he was authorized to mingle such money or securities with his own, without any earmark, and to deal with them as his own, and even though by such custom there would be but for the pro-

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visions of the statute, merely the relation of debtor and creditor between himself and his customer. The words "embezzles or fraudulently converts" would be taken to mean "embezzles, that is, fraudulently converts," and not to indicate an alternative between the two parts of the expression. It would follow that this crime, as one kind of criminal embezzlement, would be included within the express words of the definition of stealing and larceny given in R. L. c. 218, § 38, and like the similar crime considered in *Commonwealth* v. *Kelley*, 184 Mass. 320, could properly be charged in counts like those before us.

But we need not pass upon this question; for even if we follow the defendant's main argument upon this part of the case, we are yet of opinion that under the instructions given to the jury, they could not have convicted the defendant even upon these counts without having found facts which showed him to be guilty of embezzlement independently of § 47. They were expressly told in a very full and able charge that the defendant could not be found guilty of larceny by means of embezzlement unless they found that the money or other property was delivered by the owner to him under the trust and confidence that he should use it in a specified manner, and that he accepted the possession with knowledge of that direction and agreement, and that it was mutually understood and agreed by the parties that it should be kept or identified as a specific fund subject to the directions which had been given by the owner. The defendant's contention that this money or property came to him in such a way that he had a right, by the agreement between himself and the depositor, to mingle the money with his own money, to deposit a check with his own checks in the bank, or to convert securities into money and use the proceeds as his own, was fully stated to the jury; and they were instructed that if this was the case, if the relation of debtor and creditor between his customer and himself was established, if he had the right to mingle their money or the proceeds of their checks or securities with his own, then the identity of the original money or property would be lost by the consent of the owner; it could not be followed; the relation which is necessary to the crime of embezzlement would have disappeared; and he could not be convicted upon that ground. The jury were clearly and distinctly told that it

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was for them to decide as a question of fact what was the true relation that was established by the dealings between him and his customers, whether it was to make him their debtor for money or property or the proceeds of property, or to constitute him their agent or broker under a trust and confidence to use their money as a specific fund, so that it could be followed and identified and used and disposed of only in the manner directed by the customer; and they were unmistakably instructed that only in the latter case could they find that there had been an embezzlement. There can be no question that under these instructions the verdict of guilty does not rest at all upon the provisions of R. L. c. 208, § 47. *Commonwealth* v. *King*, 9 Cush. 284. *Commonwealth* v. *Moore*, 166 Mass. 513. *State* v. *Moyer*, 58 W. Va. 146. 1 Whart. Crim. Law, § 1009. 2 Bish. Crim. Law, § 325. And see the cases gathered in 15 Cyc. 488, *et seq.*; 10 Am. & Eng. Encyc. of Law, (2d ed.) 978.

There was evidence to justify a finding by the jury such as they were allowed to make under the rulings just stated. The terms both of the temporary and of the permanent receipts given by the defendant indicate that what he received under them was received for the special purpose therein stated, and under the trust and confidence that it should be applied accordingly. The testimony of the customers who were called and of other witnesses tended in the same direction. The mere fact that the defendant was a broker, though entitled to consideration, was not of itself decisive as to the character of each or any of the transactions which were in evidence. *Commonwealth* v. *Cooper*, 130 Mass. 285. There is nothing in *Brown* v. *Corey*, 191 Mass. 189, or *Commonwealth* v. *Stearns*, 2 Met. 343, which is inconsistent with this view. It could not be said as matter of law that this was not a question for the jury, and it was submitted to them with full and accurate instructions.

As to the defendant's requests for rulings that there was no evidence which would warrant a conviction upon any count on the ground that he had obtained money by criminal false pretenses, or on any count except the thirteenth on the ground of common law larceny, we do not think it necessary to recapitulate the evidence. The jury would have been warranted in finding these facts: The defendant had sustained a very great loss in

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starting and attempting to maintain a newspaper; his regular business of selling certain particular securities had come to an end; and he was sorely in need of obtaining some ready money. He thereupon published highly flaring and sensational advertisements, — well adapted to attract the attention and gain the confidence of credulous people, — advising the purchase of certain stocks, not upon margin, but upon full payment of the price, and offering upon receipt of the necessary money to make such purchases for customers without profit to himself. He had an expensive establishment to maintain, and he did not cut it down or curtail his expenses. He received large sums of money, with directions to buy particular stocks, but failed to buy them, put off his customers with false excuses, and converted the money to his own use, guarding it against attachment by putting it into the form of certificates of deposit. There was also evidence that either he, or his agents by his instructions, had made to some customers false and misleading statements by which they were induced to send or to pay to him money for stocks which it was falsely represented had been bought for them. There was certainly evidence for the jury on the question of false pretenses. And the jury might also find from his advertisements, his methods of business and correspondence with his customers, his false statements as to the purchases which he said that he had made, his false excuses for the non-delivery of stocks which he should have purchased but had not purchased, and his conduct as to the over-payments which many of his customers had made in advance, that his whole scheme was a fraud from the beginning, that his possession of the money and other property of his customers had been obtained by mere trickery with the present intent to convert it to his own use, that he had no rightful possession, and that the delivery to him was made without any intent to pass the title but merely to enable him to make the specific use of the money which was directed, so that in appropriating it he was guilty of larceny at common law. *Commonwealth* v. *Flynn*, 167 Mass. 460. *Commonwealth* v. *Rubin*, 165 Mass. 453. *Commonwealth* v. *Lannan*, 153 Mass. 287, 289. *Commonwealth* v. *Barry*, 124 Mass. 325.

It follows from what has been said that all of the defendant's requests for instructions which were not either waived or given

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in substance, were rightly refused, and the case was properly submitted to the jury.

The motion in arrest of judgment was rightly denied. All the questions raised by it have been already sufficiently considered. Even apart from the provisions of R. L. c. 219, § 38, the motion could not have been allowed. There was no exception to the ruling that the jury might return a general verdict of guilty as to each count, upon the requisite proof, whether that verdict was reached upon one or another ground, if only it was reached upon one of the grounds submitted to them. The defendant was properly sentenced under R. L. c. 208, § 26, for the larcenies of which he had been convicted.

The defendant's exceptions must be overruled, and each of the orders appealed from must be affirmed.

So ordered.

COMMONWEALTH *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

SAME *vs.* SAME.

Middlesex. January 19, 1909. — May 25, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Railroad, Obstructing highway. *Way*, Public, Obstruction by railroad company.

It is no defense to a complaint against a railroad corporation under R. L. c. 111, § 196, for obstructing a highway with cars for more than five minutes at one time, that the continuance of the obstruction was due solely to the unlawful acts of third persons not in the defendant's employ.

TWO COMPLAINTS, received and sworn to on February 20, 1908, under R. L. c. 111, § 196, now St. 1906, c. 463, Part II. § 155, against the New York Central and Hudson River Railroad Company for obstructing Cambridge Street in Cambridge with cars for more than five minutes at one time, respectively on January 23 and February 13, 1908.

In the Superior Court the cases were tried together before *Bell*, J. It being admitted that cars of the defendant obstructed Cambridge Street at each of the times alleged in the complaints

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for more than five minutes at one time, the defendant offered to prove in each of the cases the following facts:

That while the train of the defendant was standing temporarily with its cars across Cambridge Street and extending for some distance on each side of the street, third persons, without the knowledge of the defendant or its servants maliciously and in violation of law, opened the air-cocks upon certain of the cars, allowing the air to escape from the air brakes and setting the brakes so that it was impossible to move the train over the crossing and off the street without first finding and closing the air-cocks and then pumping up a fresh supply of air from the engine; that the time required to find the open air-cocks and close them and to pump up the air so as to release the brakes and move the train caused such delay that the cars obstructed the street more than five consecutive minutes; that such obstruction for more than five consecutive minutes was occasioned solely by such unlawful acts of third persons who were in no way employed by the defendant; and that but for these unlawful acts the train and cars would have been removed from the street without obstructing it for more than five minutes at one time.

Upon the foregoing offer of proof the judge ruled that the facts therein set forth would not constitute material evidence in behalf of the defendant upon the issues presented by the complaint, and that if the facts were proved they could not be found to be a good defense.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

The case was submitted on briefs.

G. L. Mayberry, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

BRALEY, J. By the St. of 1906, c. 463, Part II. § 155, section 196 of chapter 111 of the Revised Laws is incorporated without change, and by § 159 of Part III., the provisions being the same as those of existing statutes, § 155 is to be construed as a continuation of § 196, and not as a new enactment. Accordingly these complaints may be properly described as brought under § 196, which so far as material provides, that "no railroad corporation . . . or its . . . servants or agents, shall wilfully or negligently

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obstruct or unnecessarily or unreasonably use or occupy a highway, town way or street, nor in any case obstruct, use or occupy it with cars or engines for more than five minutes at one time," without incurring a prescribed penalty for each violation. It was undisputed that on two separate days the defendant's cars obstructed, or occupied for more than the time permitted, a street which presumably was a public way although not so described. The defendant does not question that under the decision in *Commonwealth* v. *New York, New Haven, & Hartford Railroad*, 112 Mass. 412, where an earlier act, of which the present statute is substantially a re-enactment, was considered, it would be no excuse if the obstruction was accidental, or could not have been avoided by the exercise of reasonable diligence. But, the valves to the air brakes having been maliciously opened by strangers without the knowledge of the defendant or its servants, so that the train could not be operated within the period owing to the delay required not only to find and close the valves but also to furnish a fresh supply of air, it contends that their interference constitutes a full defense. See St. 1906, c. 463, Part II. § 239; R. L. c. 111, § 255. Or as defined in *Commonwealth* v. *Elwell*, 2 Met. 190, 192, "if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is a matter of defense. . . ."

If, at common law, crime when committed by the individual consists of acts done with an evil intent, in statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words "wilfully" or "maliciously," is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law. *Commonwealth* v. *Bradford*, 9 Met. 268. *Commonwealth* v. *Wentworth*, 118 Mass. 441. *Commonwealth* v. *Connelly*, 163 Mass. 539. *Commonwealth* v. *Lavery*, 188 Mass. 13, 16. It is because of this familiar doctrine, inherent in the construction of statutes which prohibit under a penalty acts and conduct which otherwise are not generally deemed unmoral or criminal, that convictions for the sale of liquor, where the seller had no just

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ground to believe it was intoxicating, or of imitation butter by the defendant's agent without a descriptive wrapper, which, though furnished, he failed from mere carelessness to use, or an inadvertent sale by the defendant's servant of milk not of standard quality, and the admission of a minor to a pool room, where the defendant neither knew nor had any reason to believe that he was under age, have been sustained. *Commonwealth* v. *Savery*, 145 Mass. 212. *Commonwealth* v. *Daly*, 148 Mass. 428. *Commonwealth* v. *Warren*, 160 Mass. 533. *Commonwealth* v. *Gray*, 150 Mass. 327, 329. *Commonwealth* v. *Emmons*, 98 Mass. 6.

In other jurisdictions in the construction of similar statutes, proof of moral turpitude or of a guilty mind has never been deemed necessary to sustain a conviction. *Barnes* v. *State*, 19 Conn. 398. *State* v. *Smith*, 10 R. I. 252. *People* v. *West*, 106 N. Y. 293. *Commonwealth* v. *Zelt*, 138 Penn. St. 615. *Farmer* v. *People*, 77 Ill. 322. *Humpeler* v. *People*, 92 Ill. 400. *Jamison* v. *Burton*, 48 Iowa, 282. *State* v. *Hartfiel*, 24 Wis. 60. *Regina* v. *Woodrow*, 15 M. & W. 404. *Rex* v. *Paine*, 7 Car. & P. 135. If we turn to the language of the statute, the acts for which the defendant has been convicted are positively forbidden.

It was within legislative authority to have extended the qualifying words of "wilfully" or "negligently," which describe the offense defined in the first clause of the sentence in § 196, to the unlawful acts with which the defendant is charged. The history of this legislation from its origin to the latest revision, however, indicates clearly a public policy, which, in the language employed to define the offense, recognizes no extenuating circumstances of the nature relied on by the defendant. St. 1854, c. 378. Gen. Sts. c. 63, § 68. St. 1871, c. 83, § 1. St. 1874, c. 372, § 129. St. 1895, c. 173. R. L. c. 111, § 196. St. 1906, c. 463, Part II. § 155. *Commonwealth* v. *New York, New Haven, & Hartford Railroad, ubi supra.*

By common law as well as under R. L. c. 53, the unlawful obstruction of a public way by whomsoever caused is an indictable offense. *Commonwealth* v. *King*, 13 Met. 115. *Commonwealth* v. *Old Colony & Fall River Railroad*, 14 Gray, 93. And under R. L. c. 111, § 124, the rights of the community are

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recognized as paramount, for a railroad which is laid out across a public way must be so constructed as not to obstruct it. *Holliston* v. *New York Central & Hudson River Railroad*, 195 Mass. 299. If this section is read with § 196, the reason for the unqualified language of the last section is unmistakable. The accommodation of public travel, for which the ways have been provided and are maintained, requires that at grade crossings travellers shall not be subjected to prolonged delays arising from their occupancy by the cars or engines of a railroad company. It was within the province of the Legislature to fix the time during which a grade crossing could be encumbered, and this adjustment between its use by the public and by the railroad must be treated as not only reasonable but final until the statute is either modified or repealed. In the practical control of movements of its cars or trains, no argument has been advanced, nor was there any proof at the trial, that by competent supervision, even if necessarily required to be more or less constant, the defendant would not have been able to have prevented the mischief caused by intermedlers. Whatever its ignorance of the facts may have been, the defendant was bound at its peril to know and obey the law, and its failure to adopt such precautions as might be necessary to enable it to comply with the statute furnishes no ground of justification or defense. *Commonwealth* v. *Mash*, 7 Met. 472. *Commonwealth* v. *Curtis*, 9 Allen, 266. *Parker* v. *Alder*, [1899] 1 Q. B. 20.

Exceptions overruled.

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KATE MEAD *vs.* ANTHONY W. STRAUSS.

Middlesex. March 19, 1909. — May 25, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Of one owning or controlling real estate. *Nuisance. Way,* Public.

An apartment house in a city stood fifteen feet back from the sidewalk of the public highway, and the owner built a sidewalk nine feet wide running from the entrance of the house, the outer lines of which curved where it joined the sidewalk of the street, so that the entrance walk there was seventeen feet wide. Abutting on the sidewalk of the street, but upon his own land, the owner of the house maintained a row of bricks set in serrated form and slightly elevated above the surface of the sidewalk. Back of the curved line of the entrance walk where it joined the sidewalk, he maintained a clump of shrubs, and, six inches from the end of the bushes nearest the sidewalk, and about three inches back from the line of the sidewalk, a piece of upright pipe with a wooden plug in it, the whole being about sixteen inches high, and being one of a series of stakes along the top of which a smooth wire was strung. A woman passing on a wet night from the house to the street raised the skirt of her gown from fifteen to twenty inches and, as she turned to the sidewalk, caught it on the top of the stake and was thrown down. *Held,* that the structures maintained by the owner did not constitute a nuisance, and also that the owner in maintaining them was not guilty of negligence toward a person using the entrance of the building by his implied invitation.

TORT for injuries received as stated in the opinion. Writ in the Superior Court for the county of Middlesex dated July 15, 1905.

The case was tried before *Stevens*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. K. Berry, for the plaintiff.

J. A. Lowell, (*J. Lowell* with him,) for the defendant.

KNOWLTON, C. J. The defendant was the owner of an apartment house on Massachusetts Avenue, in Cambridge. The building stood about fifteen feet back from the southerly line of this avenue. From the main entrance, which was in the centre of the building, a brick walk about nine feet wide was constructed, extending to the sidewalk, and the corners at the intersection of this walk with the sidewalk were rounded off, so that the entrance from the sidewalk into this walk was about seventeen feet wide. The sidewalk along the front of the premises was

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about nine feet and ten inches wide, and abutting on the line of the sidewalk on the southerly side of the avenue was a row of bricks, set upon the defendant's land in serrated form, slightly elevated above the surface of the sidewalk. Opposite the easterly end of the curve formed by the junction of the walk from the entrance, on its easterly side, with the line of the street and sidewalk, there stood in and upon the land of the defendant a piece of pipe, or a stake, having a wooden plug on the top of it, so placed that the top of the plug was three inches further back than the southerly line of the street and sidewalk, the stake slightly leaning towards the street. The top of this was about six inches from a clump of shrubs or bushes, extending westerly therefrom, around the curve, along the walk towards the entrance to the building. This stake was one of several placed along the line of the defendant's land, about three inches southerly of the street line, which stakes were connected by a small, smooth wire. The wire at the stake nearest the entrance was wound around a wooden plug in the top. The line of the wire was about sixteen inches above the level of the sidewalk. The top of the wooden plug was nineteen and three-fourths inches above the level of the sidewalk, and three inches in from the street line, upon the defendant's land.

The plaintiff, in coming away from this house in the evening, lifted the skirt of her gown from fifteen to twenty inches, because the weather was rainy, started around the corner to the eastward, caught her gown upon the top of this stake, and was thrown down. The trunk of an elm tree in the street, not far away, obstructed the rays of an electric light and left this place in a shadow. This action is brought to recover for the injury received by the plaintiff from the fall.

Assuming that she was in the exercise of due care, the only question is whether there was evidence of negligence on the part of the defendant. We think it plain that, treating him as an owner on whose implied invitation the plaintiff had come to the house, there is no evidence that he was negligent in the construction or maintenance of the means of communication between the house and the street. Not only was the walk from the entrance nine feet wide throughout its whole length, but around the curve, at its junction with the sidewalk on each

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side, there was a line of shrubs and bushes, and it greatly broadened out to a width of seventeen feet before it reached the place where the first stake was set. There was no such risk of injury to persons entering the house from the street, or departing from it, as to make the defendant liable for negligence in setting up this stake opposite the place where the curve united with the line of the street.

It remains to consider whether he was liable as an abutter, to persons passing on the sidewalk, by reason of the edging of brick along a sidewalk nearly ten feet wide, with this line of stakes and a wire three inches back from the line of his own land. The decisions of this court in *Howland* v. *Vincent*, 10 Met. 371, *McIntire* v. *Roberts*, 149 Mass. 450, 452 and *Quigley* v. *Clough*, 173 Mass. 429, show that he was not. If the law should be held more strictly against abutters than it was in the first of these cases, as it has been held in some courts, and if, in the absence of a railing, an abutter should be deemed liable for a use or condition of his property near the line of the street, such as would unreasonably expose travellers to injury from inadvertently going over the line of the street, there was nothing in the condition upon the defendant's land which would constitute a nuisance or create a liability. Such an accident as happened in this case could not have been anticipated, and the method of marking the line of the sidewalk and preventing travellers from walking over the adjacent land was not an encroachment upon the rights of the public.

Exceptions overruled.

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METROPOLITAN HOME TELEPHONE COMPANY *vs.* GUY C. EMERSON.

Suffolk. March 11, 1909. — May 26, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Telephone Company. Boston. Municipal Corporations, By-laws and ordinances, Officers and agents. *Way,* Public.

An order of the board of aldermen of Boston, purporting to give to a telephone company, which is incorporated under the laws of this Commonwealth but which has not yet any telephone system in actual operation in the city, a right to establish above and below all present and future streets in Boston all such appropriate structures as may be adapted to the installation and maintenance of an electrical or other system for "the transmission of sound, signals and intelligence," discloses the characteristics of a franchise rather than of a permit, and is beyond the power of the board, and therefore void.

The power given by R. L. c. 25, § 54; c. 26, §§ 2, 6, to the selectmen of towns and the mayors and boards of aldermen of cities to permit the use of public ways for telegraph and telephone wires by the laying of wires in the first instance under such ways, is subject to, and cannot be exercised until satisfaction of, the provisions of R. L. c. 122, § 2, as amended by St. 1906, c. 117, relating to the method of applying for such locations, and to public hearings before the granting of them.

PETITION, filed in the Supreme Judicial Court for the county of Suffolk on January 19, 1909, and amended on February 12, 1909, for a writ of mandamus directing the respondent, the superintendent of streets of Boston, to issue a permit to the petitioner to open and occupy Linden Park Street, a public street in Boston.

The tenth paragraph of the answer was as follows: "10. And further answering the respondent says that the petition should be dismissed because it does not state a legal cause of action substantially in accordance with the rules prescribed by the statutes of the Commonwealth; and because the facts alleged therein do not constitute or show any legal ground of action by the petitioner against the respondent; and because the facts set forth in the petition show that the board of aldermen had no authority to pass the order therein set forth; and because it appears from said petition that said order is illegal and void, and that the petitioner acquired no right under it to locate poles and to put wires or conduits in the public streets of the city."

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The case came on for a hearing upon the merits by *Sheldon*, J., who made the following reservation:

"Being of the opinion that the questions of law raised by the tenth paragraph of the respondent's answer ought to be determined by the full court before any further proceedings had in the trial court, I reserve those questions for that purpose. The reservation is made by agreement of parties, and without having heard any evidence. If these questions are decided in favor of the respondent, the petition is to be dismissed, unless leave to amend the petition is given by a single justice; otherwise the case is to stand for hearing."

B. B. Jones, (*A. S. Hayes* with him,) for the plaintiff.

T. M. Babson, for the defendant.

RUGG, J. This is a petition for a writ of mandamus to compel the defendant as superintendent of streets of the city of Boston to issue to the petitioner a permit to open and occupy a public street in order to enable it to lay its telephone lines under the street. The petitioner is a corporation organized under the laws of this Commonwealth for the purpose of constructing, maintaining and operating a telephone and telegraph system. On December 13, 1906, the board of aldermen of the city of Boston adopted an order, which purported to grant to the petitioner the right "in, upon, over, under and along the present and future streets, avenues, alleys, viaducts and public places of the city of Boston to cause to be erected, constructed and installed, and operate, maintain and repair lines of conduits, wires, cables and conductors, poles and appliances, . . . and to operate and maintain suitable and adequate apparatus and appurtenances." The order then names more than two hundred streets and squares "in which the lines, conduits, cables, wires and conductors . . . may be laid, placed and installed," and adds "any and all the streets, avenues, alleys and public places directly or remotely connected" with those named. Other expressions are that the petitioner "may erect and maintain a system of conduits, poles, wires, cables and appliances," and that the city officers must "issue permits for distributing poles and appliances." No specific part of any street is designated, where the conduits may be laid or poles placed. No attempt was made to comply with the provision of R. L. c. 122, § 2, as amended

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by St. 1906, c. 117. No petition in writing is alleged to have been presented to the board of aldermen, and no written notices of the time and place of a public hearing upon such petition were given to owners of real estate along the ways named. No specification in writing "where the poles may be located, the kind of poles, the height at which, and the places where the wires may run" was given by the aldermen, as required by that statute. The petitioner contends that the order was valid under R. L. c. 25, § 54, and c. 26, §§ 2 and 6, whereby the board of aldermen of a city is empowered "to permit telephone and telegraph lines to be laid under any way or square" and to establish reasonable regulations touching the same.

The order in effect, although slightly veiled in some respects, purports to give to the petitioner a right to locate, above and below all present and future streets in Boston, all such appropriate structures as may be adapted to the installation and maintenance of an electrical or other system for "the transmission of sound, signals and intelligence." Our statutes contemplate and authorize no such ambitious pre-emption of public ways. The policy of our Legislature as shown in all statutes regulating the partial appropriation of public ways to such public uses as are included within the general purpose for which land may be taken from a private owner for highway uses, is to clothe the board, for the time being representing the public interests, with authority to consider and pass upon a present specific need, and not to mortgage futurity in the hope that the requirements of the public service may at some time, more or less remote, warrant the use, or for any other reason. This limitation is not to be found in express phrase anywhere in the statutes, but is one of the basic principles of our policy in dealing with public service corporations. The franchise of the petitioner to be a corporation and conduct its business came from the Commonwealth, and not from the board of aldermen of the city of Boston. This order has many of the features of a franchise. But the board of aldermen was authorized only to permit or specify the location of the conduits and poles and other structures. A permit or location is different in kind from a franchise, and is inferior and subsidiary to it. Sometimes the terms of a permit from or a contract with local authorities are

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incorporated in a franchise (see St. 1851, c. 159; *Worcester Gas Light Co.* v. *Worcester*, 110 Mass. 353), but the functions of a franchise cannot be performed by a permit. The conception of granting to any telephone or street railway company or any other public service corporation at once and in advance of its practical operation the right to occupy all the streets of a municipality is repulsive to our theory of local and State supervision and regulation in detail of constructions in public ways by such corporations. The power is vested in selectmen and boards of aldermen, not as representatives of the cities and towns, but as independent boards of public officers, who act in a judicial or *quasi* judicial capacity respecting the subject matter. This is for the reason that the Legislature has thought wise from the outset to make these corporations in the use of the streets subject to the control of the local authorities of the municipalities charged generally with the duty of maintaining them in repair. In some instances there is an appeal to a State board, but in the first instance the local board acts. A franchise involves a greater or less degree of comprehensiveness and generality, and its exercise something of time and development. A permit, specification or location is narrow and definite, adapted to immediate or early use or service, and depending upon present conditions. In the nature of things there cannot be a present need for permits to use all the streets of a city so large as Boston for the installation of a telephone system no part of which is in actual operation. The development of such an extensive business necessarily involves a considerable time, a period of years, if experience is taken as a guide. But the changes, which may well come about in a brief interval, in the additional structures reasonably to be placed in a street, are such as to make it almost inconceivable that the Legislature could have intended to place it in the power of a local board to incumber at once and in advance of any work all streets, and subject future needs to the rights of a single company. The scope and framework of this order, universal and perpetual in nature, discloses the characteristics of a franchise rather than of a permit, and is so contrary to the scheme of our statutes upon this subject as to be void.

The order is also invalid, for the reason that the terms of St.

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1906, c. 117, were not complied with. The petitioner contends that, although the order authorizes the erection of poles, yet these portions, which concern the laying of underground conduits, may be held legal because so separable from its other provisions as not to lead to the conclusion that the pole locations were of its essence and that it would not have been adopted without them. We do not discuss this contention, for the reason that the petitioner's further necessary argument, that the granting of permits for underground conduits is wholly governed by R. L. c. 25, § 54, is unsound. This section, with R. L. c. 26, §§ 2 and 6, empowers selectmen and boards of aldermen to permit the laying of underground conduits for telephone and telegraph wires and the establishment of regulations in cities by ordinance for the erection and maintenance of such lines, but does not require a petition in writing, notices to abutting landowners, hearing and a record, filed with other municipal records, of the decision and specification granted.

The petitioner contends that no notice to abutters was required. Its contention, if sound, reaches to the requirement for a petition, the making of the specification in writing, the hearing and the filing of record. If supported, it would allow an oral application for a permit to lay underground conduits and the *viva voce* granting of the same without specification or any written evidence or record respecting it, save the journal, which the city clerk may be required to keep of the proceedings of the board of aldermen. See St. 1854, c. 448, § 30.

In view of the multiplication of uses to which the space beneath the surface of streets is now put in large cities, the crowded condition in many places, the expense and danger involved in uncovering some of those underground structures, the great inconvenience to the public from prolonged excavation in the streets and the immense importance of preserving among public records the precise position of underground structures and defining with exactness the rights of their owners, this result cannot be assumed to have been the intent of the Legislature unless made clear by unmistakable language.

The general subject of the construction of lines for the transmission of intelligence on highways is regulated by R. L. c. 122 and its amendments. This is indicated by its title and sub-titles.

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That it was intended to govern and be a code for the whole subject is inferable also from its history in St. 1849, c. 93, Gen. Sts. c. 64, Pub. St. c. 109, and St. 1895, c. 350, all of which manifest increasing detail of regulation. The provision now found in R. L. c. 25, § 54, upon which the petitioner relies, was first enacted by St. 1880, c. 83. Its title, "An Act concerning telegraph and other wires," as well as express reference in its § 3, is some indication that its provisions were intended to attach by way of amendment to the general law touching telegraph companies, then found in Gen. Sts. c. 64. But when the statute law was consolidated in the Public Statutes, its provisions were incorporated in the chapter relating to towns, probably because it authorized regulations and ordinances by municipalities, and this arrangement has been continued in the Revised Laws.

But the substance and not the collocation of a statute is the controlling consideration in its interpretation. This provision confers jurisdiction, it does not prescribe procedure. It empowers municipal officers to authorize the laying of underground conduits for wires. But the general subject of wires of telephone companies being regulated in another chapter, the procedure there pointed out must govern the exercise of the authority conferred. The title of St. 1906, c. 117, "An Act relative to the granting of locations for poles and wires in towns," by the word "wires" comprehends their location under as well as above the surface of highways. The body of the act refers to "the poles . . . the places where the wires may run," to "fixtures upon or along any public way" and to the proposal of companies "to construct . . . lines" all of which are not inapt to include underground construction. The substance of said c. 117 as to written petition, hearing, notice to landowners, written specification of precise locations, and public record thereof apply in reason with quite as much force to that which is below as to that which is above the street surface. Almost irreparable confusion and mischief would be wrought by adopting any other construction of the statutes.

These considerations lead to the conclusion that the procedure provided by St. 1906, c. 117, applies to permits granted to companies under R. L. St. c. 25, § 54, for underground constructions

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as well as to overhead structures authorized by other provisions of law. We do not intimate that this procedure applies to the putting of existing overhead wires underground at the command of the Legislature upon terms enacted with reference to the special conditions of particular municipalities. See St. 1894, c. 454, St. 1898, c. 249, St. 1908, c. 347, as to Boston; St. 1900, c. 276, as to Springfield; St. 1902, c. 372, as to Worcester; St. 1905, c. 278, as to Somerville; St. 1906, c. 131, as to Pittsfield; St. 1906, c. 391, as to Haverhill.

Petition dismissed.

MARIETTA C. FERNALD & another, executors, *vs.* SARAH G. GOOCH & others.

Middlesex. March 16, 1909. — May 26, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy, Bequest of residue to executors "for their services."

A testatrix in a will drawn by herself made sixteen bequests to relatives and friends and charitable organizations amounting to $17,500, and also disposed of her personal belongings, silver and household furniture. The will in addition contained the following clause: "Should there be a residue, . . . I request my executors to pay [to two charitable organizations named] whatever remains if not more than $1,000. Should there be more than that sum remaining, I direct that the surplus be used toward the payment of my executors for their services under this will." After she had made her will, the testatrix lost considerable money in bad investments, and thereupon went to a lawyer with whom she had a slight acquaintance and executed a codicil in which in the first paragraph she expressly ratified and confirmed her will "in all respects save as the same . . . [was] . . . changed" by the codicil, and in subsequent paragraphs revoked five of her charitable bequests amounting to $2,600, added bequests amounting to $1,050, limited the amount to be given to the charitable organizations by the portion of the will above quoted to $500, stated "it is my desire that regardless of any residuary provisions contained in said will my executors receive in any event fair compensation for their services," revoked the nomination of one of two executors named in her will, who was her nephew, and substituted for him the lawyer who drew the codicil, and stated, "All provisions of said will applicable to executors shall apply to" the newly named executor. After administration of the estate, and the payment of $900 to the executors on account of their services, there was left $3,000 which the executors claimed under the terms of the will. *Held*, that under the terms of the will and codicil such residue went to the executors for their own benefit.

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BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Middlesex on December 1, 1906, by the executors of the will of Anna M. J. Coolidge, late of Cambridge, for instructions regarding the disposition of the residue of her estate.

The will of the plaintiffs' testatrix, executed on February 13, 1897, was drawn by herself. In the first clause she directed that her just debts and funeral expenses be paid. In the second clause she gave $4,000 to Eliza H. Fernald and Marietta C. Fernald, (one of the executors,) "when the homestead in which we all at present reside . . . shall be sold." In the third clause, she gave $2,000 each to Mrs. Sarah G. Gooch and to her daughter, Mrs. Annie G. Wyman; in the fourth clause, $2,000 each to her nieces Emma A. Bearse and Louise P. Brown; in the fifth, $300 to her cousin Mary Gardner, $500 to her cousin Elvira Hastings, $100 to her "dear friend" Annie E. Hubbard; in the sixth clause, $1,000 to the Woman's American Baptist Home Mission Society, $1,000 to the American Baptist Home Mission Society, $500 to the "Mission in Alaska," $500 to the Woman's Baptist Foreign Mission Society; in the seventh clause she gave $500 each to the Old Cambridge Baptist Church and to the First Baptist Church of Watertown; in the eighth clause, $300 each to the Boston Baptist Bethel and to the Old People's Home in Cambridgeport; in the ninth clause she disposed of her silver, clothing and household goods.

The tenth clause read as follows:

"Tenth, I have made no bequest to my brother's widow, Mrs. Emily G. Coolidge, and her daughter Abbie D. Coolidge, not because I love them any less than the other dear ones to whom I have bequeathed a little, but because their property is so valuable, they do not need any of mine to make life for them any easier; still as a token of my affection, I give to them any books or pictures belonging to me they may desire.

"If from shrinkage of my estate my property is not sufficient to pay the legacies, the legatees must bear their proportion of the shrinkage. Should there be a residue, after the legacies, debts, and all expenses have been paid, I request my executors, to pay the American Baptist Home Mission Society for the benefit of the Church Edifice Fund whatever remains if not

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more than one thousand dollars. Should there be more than that sum remaining, I direct that the surplus be used toward the payment of my executors for their services under this will."

The testatrix made a codicil to her will on June 16, 1903, in which she revoked the bequests to the American Baptist Home Mission Society and to the Mission in Alaska, contained in the sixth clause of the will, the bequest to the Old Cambridge Baptist Church in the seventh clause of the will, and those to the Boston Baptist Bethel and Old People's Home in Cambridgeport in the eighth clause of the will. She also revoked the bequests to Emily G. and Abbie D. Coolidge contained in the tenth clause of the will and instead gave Abbie D. Coolidge $1,000. To Katie Morrissey, "as a token of love and appreciation of her kind services," she gave $50. The remainder of the codicil read as follows in substance:

"I hereby limit the amount of the residuary bequest to the American Baptist Home Mission Society for the benefit of the Church Edifice fund to five hundred dollars instead of one thousand dollars as therein stated, and it is my desire that regardless of any residuary provisions contained in said will my executors receive in any event fair compensation for their services. . . .

"Whereas I named my nephew Joseph A. Coolidge to be one of the executors of said will I hereby revoke said appointment and hereby name Volney Skinner of said Watertown to be one of the executors of said will and request that said Volney Skinner be exempt from giving surety on his bond as such executor. All provisions of said will applicable to executors shall apply to said Volney Skinner."

The case was heard by *Morton*, J. He found the facts stated in the opinion, and also as follows: "The petitioner Volney Skinner is an attorney at law and drafted said codicil. He is in no way related to the testatrix. He frequently met the testatrix at the church which they both attended up to the year 1887, when he ceased to attend said church, and from that time he and the testatrix saw little of each other. During the entire period of their acquaintance he called at her home about three times, including the time when he drew the said codicil. . . .

"There will be an apparent residue after the payment of said last mentioned legacies of $3,900, of which the executors have

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retained on account of their services as shown by their first account the sum of $900."

The case was reserved by the justice for determination by the full court.

The case was submitted on briefs.

H. B. Patrick, for the plaintiffs.

J. P. Wyman, G. R. Blinn & A. L. Taylor, for the defendant Sarah G. Gooch.

SHELDON, J. This will, as originally drawn by the testatrix herself, was intended to dispose of all her property. She gave legacies of stated sums of money to nearly all of her next of kin, and made some charitable bequests. She then, after providing for any shrinkage of her estate, directed that the residue of her property after the payment of another charitable bequest, should be used toward the payment of her executors for their services under her will. We think it evident that under the terms of this will the amount of any final residue, however large it might have been, would have gone to the persons named as executors for their personal benefit.

But some six years after the making of this will, having lost about $3,800 by bad investments in mining stocks, she executed a codicil to her will. By this instrument she revoked some legacies and made other changes, the effect of which was to reduce considerably the amount of her pecuniary legacies. She also revoked the appointment of one of her executors, and put in his place the attorney who drew the codicil. But in the first paragraph of the codicil she expressly confirmed and ratified her will "in all respects save as the same . . . [was] . . . changed" by the codicil; and she specifically provided in the clause which nominated the new executor that "all the provisions of . . . [her] . . . said will applicable to executors . . . [should] . . . apply" to the new executor.

Taking the will and the codicil together, it seems plain that she still intended to dispose of all her estate, and that she did not intend her next of kin to take more than she gave to them in terms. She said in the tenth clause of her will that she gave nothing to her brother's widow and to the daughter of that widow, who was one of her own next of kin, because they needed no assistance from her; and this would indicate that she did not

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intend any part of the residue of her estate to go as undisposed of property to her next of kin and so in part to this niece. Nor does the fact that by the codicil she gave a pecuniary legacy to this niece diminish the force of the implication. She desired that this niece should take the legacy and nothing more. Clearly this would have been so if the will had stood alone. *Damon* v. *Bibber*, 135 Mass. 458. *Kenady* v. *Sinnott*, 179 U. S. 606, 616. *Robards* v. *Brown*, 167 Mo. 447, 457. And the provision made in this will for the executors was for their own benefit and not in trust for any others, as it was in *Minot* v. *Attorney General*, 189 Mass. 176. Nor do we find anything in the codicil which, when read in connection with the will, shows a change in her intent. The argument that such a change should be inferred from the substitution of one who was merely a friendly acquaintance for a nephew as one of the executors is met by the language which she used in making this change, and which we have quoted above. The provision in the codicil that regardless of any residuary provisions in the codicil her executors should receive in any event fair compensation for their services does not import such a change of intent. Taken in connection with her express confirmation of the will, it shows that she did not desire to change that part of her will any further than to guard against the possible implication that their compensation was to be limited to the amount of the residue of her estate, however small that might turn out to be. It was a provision made for their benefit, not as a limitation of what they were to receive.

It is probable that the residue of the estate is larger than was expected by the testatrix; and it reasonably may be conjectured that if she had foreseen the present state of affairs she would have made some other disposition of this amount; but upon the face of the will and codicil we are of opinion that the residue after payment of the legacy to the American Baptist Home Mission Society must go to the executors for their own benefit.

Decree accordingly.

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BUTTRICK LUMBER COMPANY *vs.* MICHAEL P. COLLINS.

Middlesex. January 12, 1909. — May 28, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Assignment. Release. Contract, Performance and breach, Building contracts, Implied in law. *Order.*

In an action on an order in writing payable to the plaintiff drawn upon the defendant by a contractor who was engaged in constructing a building on the defendant's land, it appeared that the order was payable from any amount due to the contractor on the final payment under his contract with the defendant, and that this order was accepted in writing by the defendant before the completion of the work under the contract. There was evidence on which it could have been found that afterwards the contractor fully performed his contract, or that his work, although differing in some unimportant particulars from the specifications of the contract, was accepted by the defendant as a complete performance of it. It further appeared that, when the building could have been found to have been completed and the time for the final payment had arrived, the defendant owed the contractor a sum of money more than sufficient to satisfy the plaintiff's order, and that thereupon the contractor and the defendant made a settlement, by which the contractor released the defendant from all liability to him, and accepted in return a payment of $100 and a promise of the defendant to assume and pay all bills of persons having liens upon the building. *Held*, that the case was for the jury, and that, upon the jury finding that the contractor had performed his contract and was entitled to a final payment more than sufficient to cover the amount of the plaintiff's order or assignment accepted by the defendant, the plaintiff was entitled to recover that amount in full, the subsequent release by the contractor, to which the plaintiff was not a party, having no effect to discharge or revoke the assignment of the fund to the plaintiff, and the defendant having no right, after his acceptance of the order, to reduce the amount coming to the plaintiff out of the final payment, by diverting the fund to the payment of liens which he had agreed to assume and discharge for his own benefit.

In an action against a landowner on an order in writing, drawn by a contractor and accepted by the defendant as payable "from any amount due" the contractor "on final payment" under a contract for the construction of a building, if it appears that the contractor in good faith has performed his contract in substance, and, although there have been some unessential variations from the letter of the contract, he would be entitled to recover from the landowner on a *quantum meruit* the value of his work and materials to an amount not exceeding the contract price reduced by the amount of damage suffered by the landowner on account of the contractor's departure from a strict performance, the plaintiff as the holder of the order can recover this amount.

CONTRACT upon an order in writing payable to the plaintiff drawn by one John G. Foster upon the defendant and accepted by him. Writ dated March 28, 1904.

The order declared upon was as follows:

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"Waltham, Mass., 8/8, 1903.

"Mr. M. P. Collins,

"Dear Sir:

"Please reserve and pay the Buttrick Lumber Co. one thousand ($1000) dollars and deduct the same from any amount due me on final payment.

"John G. Foster."

"Accepted, — M. P. Collins,
By Geo. E. Strout, Archt."

In the Superior Court the case was tried before *Bond*, J. The contract to which the order related began as follows:

"Building contract, made this seventeenth day of February one thousand nine hundred and three, by and between M. P. Collins of Waltham, Mass., and John G. Foster of Waltham, Mass., builder.

"The said John G. Foster agrees with the said M. P. Collins to make, erect, build and finish in a good, substantial and workmanlike manner, a 3-store and apartment brick faced building upon lot situated at the corner of Main and Lexington Streets, Waltham, Mass., said building to be built of good and substantial material and in accordance with the drafts, plans, explanations or specifications furnished or to be furnished to said John G. Foster by Geo. E. Strout, Architect, and to be finished complete on or before the fifteenth day of June, 1903.

"And the said M. P. Collins agrees to pay for the same to the said John G. Foster the sum of six thousand and fifty dollars, as follows:

1st $1200 when outside walls are up and roof covered.
2nd $1150 when building is plastered, cellar cemented and windows in.
3rd $1000 when stores are finished and building finished outside.
4th $1200 when building is completed.
5th $1500, 31 days after building is completed.

"Security against mechanics' or other liens is to be furnished by said John Foster prior to fifth payment."

Foster was called by the plaintiff as a witness, and the substance of his testimony is described in the opinion.

The order sued upon was made and accepted on August 8, 1903. Foster testified that he began work under the contract in

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February, 1903, and that he completed the construction of the building in September, 1903.

Foster also testified that he made a settlement with the defendant on October 12, 1903, and at that time signed a release, which was put in evidence by the plaintiff. It was dated October 12, 1903, and was a release in full of all claims which Foster had against Collins.

He further testified, "The consideration of my signing the release was that he [Collins] should pay all bills then having a hold on the building. . . . At that time there was $2,200 due me. There was a balance of $700 on the fourth payment, and a final payment of $1,500. That final payment was due according to the contract thirty-one days after, and I finished about September 11. So on October 12 there was $2,200 due me from Mr. Collins. I did not get any money when I signed the release. I understood he was to pay the bills that had a hold on the building. I don't know what time the owner moved into the building, but I think it was before October 12."

At the close of the evidence, the defendant asked the judge for seventeen rulings and instructions to the jury. Of these the judge gave the eighth, fifteenth, sixteenth and seventeenth as follows:

"8. The order upon which this action is brought was a conditional order, payable only out of the final payment when it should become due according to the terms of the contract."

"15. The fact that the defendant made payments from time to time to Foster under the contract, does not constitute a waiver of his right to have Foster complete the contract according to the plans and specifications.

"16. The fact that the defendant entered into possession and occupied the building, after Foster had refused to do any further work upon it, does not amount to an acceptance of the building, or a waiver of his right to have the contract fully performed.

"17. The burden of proof is upon the plaintiff to show that the final payment became due to Foster."

The remaining rulings and instructions requested by the defendant, which the judge refused to give, were as follows:

"1. Upon all the evidence the plaintiff is not entitled to maintain this action.

"2. By the terms of the contract between the defendant and

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Foster, the final payment did not become due so long as there were valid claims entitled to be maintained as liens upon the building, for which Foster gave no security.

"3. There is no evidence which would warrant the jury in finding that the agreement between Foster and the defendant which resulted in the release executed by Foster Oct. 12, 1903, operated to make the final payment due to Foster according to the terms of the order.

"4. If the defendant, on October 12, 1903, in consideration of the release then executed by Foster, agreed to pay him $100 and to pay all valid liens upon the building, that agreement did not amount to a waiver of the defendant's rights to refuse payment of the order upon the ground that the final payment never became due according to the terms of the contract.

"5. In the absence of fraud or collusion for the purpose of defeating the plaintiff's claim, the defendant had a right to enter into a new agreement with Foster on Oct. 12, 1903, by which he agreed to pay Foster $100 and pay all valid outstanding liens upon the building, in consideration of the execution of the release by Foster of all further claims upon him, even though such agreement would operate to defeat the plaintiff's claim upon the order.

"6. The acceptance of the plaintiff's order by the defendant would not deprive the defendant and Foster of the right to modify their contract in such way as they might deem best, in the absence of fraud or collusion between them to defeat the plaintiff's claim.

"7. If on October 12, 1903, there was a *bona fide* difference of opinion between the defendant and Foster as to whether the building had been completed according to the plans and specifications, and if they then compromised their differences by entering into a new agreement whereby Foster released the defendant from all further liability to him in consideration of the defendant's promise to pay him $100 and to assume and pay all valid outstanding liens upon the building, such compromise agreement violated no rights of the plaintiff in any such way as to entitle it to maintain this action upon the order."

"9. This action was prematurely brought.

"10. The final payment upon the contract between the de-

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fendant and Foster could not be regarded as due, so long as there were valid outstanding liens in favor of McKenna and John W. Foster. [John W. Foster was the father of John G. Foster who had done work on the building.]

"11. If the defendant accepted the order in suit payable out of the final payment when due on the contract, and afterwards accepted the order of another sub-contractor, which was paid out of money coming due Foster upon prior payments either under the contract or for extras, which money if not so paid might have been applied to the payment of liens upon the building, the plaintiff cannot for that reason disregard the amount of such lien, and recover the amount of his order as if such liens had been paid out of such prior payments.

"12. Foster had a right to have money coming due him on account of prior payments under the contract or for extras, paid or applied as he saw fit, notwithstanding the fact that the plaintiff had an order payable out of the final payment, even though the result might be that the plaintiff's order would be defeated because of the defendant's right to retain out of the final payment enough to satisfy all valid liens upon the building.

"13. The defendant is entitled to be allowed out of the final payment all sums that may be necessary to extinguish liens upon the building which cannot be extinguished out of other funds of Foster in his hands, and the plaintiff can at best recover no more than the balance of such final payment remaining after such liens are extinguished.

"14. If Foster failed to complete the building according to the contract, the plaintiff cannot recover."

The judge refused to make or give any of these rulings and instructions, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $1,115.50. The defendant alleged exceptions to the refusals of the judge to rule as requested. "The defendant also excepted to that portion of the charge in which the judge charged the jury that if Foster in good faith thought he had performed the contract and for that reason might be entitled to pay for his work with deductions for the cost of rectifying the deficiencies in the matters in which he failed to complete his contract that then he would become entitled to the final payment, or some portion of it, under the contract, within

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the meaning of this order. The defendant stated at the time of taking this last exception and as a reason for taking it, that he thought the rule there announced by the judge was a rule under which the plaintiff recovered, not on the contract, but on a *quantum meruit*."

G. L. Mayberry, for the defendant.

W. J. Barry, for the plaintiff.

BRALEY, J. The order and its acceptance, while improperly declared on as an inland bill of exchange, has been treated throughout by the parties and the trial judge as the written promise of the defendant to pay the amount named to the plaintiff from the final payment due to the drawer under a building contract in process of performance. *Wells* v. *Brigham*, 6 Cush. 6. R. L. c. 73, §§ 143, 146. But, no question of pleading having been raised, we consider the case as presented.

If the acceptance of the order in the name of the defendant by the architect was unauthorized, there was ample evidence of ratification for the consideration of the jury, to whom this question was rightly submitted. *Lawrence* v. *Lewis*, 133 Mass. 561.

The validity of the defendant's signature being established, acceptance had been proved, and, subject to the provisions of the contract, the accepted order operated as an assignment for the plaintiff's benefit of so much of the final payment as might be necessary to satisfy the amount for which it was drawn. By the assignment and the promise of the defendant, his liability to Foster, the original debtor, was discharged for the amount, and this furnished a sufficient consideration for the promise. *Burrows* v. *Glover*, 106 Mass. 324, 325. *Griffin* v. *Cunningham*, 183 Mass. 505.

But, although the plaintiff could sue in its own name, it was required to show a compliance with the precedent conditions upon which the final payment depended, as the assignor, with whose remedial rights the plaintiff is clothed, could not recover under the contract, without proof that it had been performed. *Gillis* v. *Cobe*, 177 Mass. 584. *Allen* v. *Mayers*, 184 Mass. 486. *Burke* v. *Coyne*, 188 Mass. 401. *Corsiglia* v. *Burnham*, 189 Mass. 347. Upon this question the evidence was conflicting. The erection of the building was under the supervision of an architect by whom earlier payments had been approved, and who could

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have been found to have been fully conversant with all of the details of construction as the work progressed. If the contractor whom the plaintiff called as a witness was believed, the jury could find that neither the defendant, who lived next door and was familiar with the general character of the work, nor the architect, during the six months in which the building was under construction, made any objection to the quality of the materials used or the character of the work until it had been substantially finished and the defendant had entered into occupation. A list then was furnished, containing twenty-six particulars in which the architect said that the work did not conform to the specifications. In his evidence the witness, while asserting that in every particular he had performed the contract, took up these items separately and gave a full explanation as to each and said that, after a full examination of all the matters complained of, he had completed them as requested, except that he had refused to change the "store fronts," which he insisted were finished properly. He also said that he made every reasonable effort to perform the contract, and believed that there had been a full compliance with the specifications. In the specifications "all doors and windows in stores" were to be finished on the interior with moulded casings. These were put on, and, even if the defendant maintained that the mouldings should have been plain because they were so shown by a detailed drawing supplied by the architect, there is no clause in the contract providing that such drawings shall control the specifications, with which the contractor had complied. It was not until the trial that the defendant further said that the front wall was not plumb within an inch or half an inch, and this the plaintiff conceded. But upon this matter the contractor further testified, that the wall could not be plumb because it was built to conform with the front wall of the defendant's adjoining building with which it fully corresponded.

While acceptance may be express, or implied from the conduct of the owner or his agent, yet mere occupancy, or part payment, and nothing further, unless the contract so provides, do not of themselves warrant an inference of the acceptance of work, where defects are complained of, but they may be considered in connection with other facts, where satisfactory per-

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formance of a building contract is in issue. The question is one of fact. It was open for the jury to say upon all the evidence, that all of the various details of defective workmanship set forth in the notice had been remedied wherever there had been a departure from the specifications, and, from the conduct of the architect and the defendant in remaining silent when they could have been found to have known of it, coupled with the fact that the front wall of the new building was apparently intended to correspond with the defendant's adjoining estate, that as finally finished the building had been accepted as having been fully completed. *Gray* v. *James*, 128 Mass. 110. *Beharrell* v. *Quimby*, 162 Mass. 571. *Gillis* v. *Cobe*, 177 Mass. 584.

It is true that both the architect and the defendant gave evidence of a failure of performance in important matters which had not been remedied. The jury, however, were not required to accept their testimony and to reject that of the contractor, and, if they found that the contract had been performed, the last instalment of the contract price had been earned. *Olmstead* v. *Beale*, 19 Pick. 528. *Wiley* v. *Athol*, 150 Mass. 426, 435. *Allen* v. *Mayers*, 184 Mass. 486. But, if earned, it was not payable if there were outstanding mechanic's liens at the date of the plaintiff's writ, for which security must be given as called for by the contract. That such liens were in existence the plaintiff admitted, but upon uncontroverted evidence, the effect of which was left to the jury under suitable instructions, it could have been found that the defendant on October 12, 1903, had obtained from Foster a release of all claims and demands, the actual consideration for which besides the receipt of $100 in money included the payment by the defendant of the liens. By this transaction the release operated as a satisfaction of the performance of this condition, even if the amount paid to the releasor was only a very small part of what he claimed to be coming to him. But, the release to which it was not a party did not discharge or revoke the plaintiff's assignment of the fund, and the defendant could not use the plaintiff's money in payment of liens, which he himself had agreed to assume and discharge for his own benefit by way of a settlement with the builder. There had been no abandonment or cancellation of the contract as in *Linnehan* v. *Matthews*, 149 Mass. 29, and in *Glidden* v. *Massachusetts Hos-*

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pital Life Ins. Co. 187 Mass. 538, but only a settlement with Foster who was claiming under it as having been fully performed. The defendant, having accepted the order, could not reduce the amount coming to the plaintiff out of the final payment by charging against it directly or indirectly orders afterwards accepted or the money paid for the release. The order, followed by acceptance, was for part of a particular fund, and bound the fund in the defendant's hands as against the subsequent claims of attaching or other creditors of Foster. *Dennis* v. *Twitchell*, 10 Met. 180. *Kingman* v. *Perkins*, 105 Mass. 111. *Hall* v. *Dorchester Ins. Co.* 111 Mass. 53. *St. John* v. *Charles*, 105 Mass. 262. *Burrows* v. *Glover*, 106 Mass. 324. *Brill* v. *Tuttle*, 81 N. Y. 454, 457. *Walker* v. *Rostron*, 9 M. & W. 411. Besides, as between themselves, Foster and the defendant, so long as the contract remained in force, could not by anticipation reduce the final payment below the plaintiff's interest through over payments of preceding instalments. *Eastman* v. *Wright*, 6 Pick. 316, 322. *Sanders* v. *Soutter*, 136 N. Y. 97. *Todd* v. *Meding*, 11 Dick. 83. If these orders, the amount of the liens at their face value and the payment for the release were not taken out, there was no dispute but there would be more than enough remaining of the final payment to satisfy the plaintiff's demand.

But, while the defendant's requests so far as they were not given were properly refused, in instructing the jury upon the question raised by the fourteenth request, after having said that there could be no recovery unless the contract was performed according to its terms or the defendant had accepted the building as it stood, the judge went further, and said, that, if in good faith there had been a substantial performance, the plaintiff could recover the balance due to the amount of the assignment, less any trifling deductions required to complete the work. The defendant, having pleaded the contract, was protected by its terms by which the plaintiff also became bound. If there had been some immaterial variations so that recovery under the strict letter of the contract could not be had, yet the contract had not been abrogated; and the measure of the defendant's liability for labor and materials under the rule in *Hayward* v. *Leonard*, 7 Pick. 181, continued to be the contract price. *Blood* v. *Wilson*, 141 Mass. 25. *Burke* v. *Coyne*, 188 Mass. 401.

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The accepted order, as we have said, was a partial and effective appropriation of a recognized debt or fund, namely, the amount which might be found finally due to Foster, and the plaintiff's right of priority still attached whatever the form of procedure. *Bourne* v. *Cabot*, 3 Met. 305. *Kendall* v. *United States*, 7 Wall. 113.

The defendant's exceptions to the charge therefore were not well taken, and, there having been no error of law at the trial, the order must be,

Exceptions overruled.

HOME FOR AGED WOMEN *vs.* COMMONWEALTH.

RALPH B. WILLIAMS *vs.* SAME.

GEORGE WIGGLESWORTH & others, trustees, *vs.* SAME.

ROBERT C. HEATON & others, executors, *vs.* SAME.

Suffolk. March 9, 1909. — June 1, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Tide Water. Navigable Waters. Sea Shore. Riparian Owner. Charles River. Charles River Basin.

The right of a riparian owner upon navigable tide water of direct access from his land to navigable water, which is a special and peculiar right different from the public right of passage over the water, is subject to the right of the Commonwealth for the public good to take and fill the land lying below low water mark between his land and the tide water, so as to cut off direct access from his land to the navigable water.

The change in the Charles River authorized by St. 1903, c. 465, as amended by St. 1906, c. 402, was for the improvement of navigation as well as for other useful purposes, and the fact that this was one of the purposes of the Legislature was enough to warrant the legislation and the action under it, even if such a change in the river could not have been authorized for the other useful purposes alone without providing compensation for riparian proprietors.

In St. 1903, c. 465, as amended by St. 1906, c. 402, relating to the Charles River Basin, providing for the creation of a dam sufficiently high to hold back all tides and to maintain in the basin a substantially permanent water level not less than eight feet above Boston base, also for a suitable lock to be built not less than three hundred and fifty feet in length between the gates, forty feet in width and thirteen feet below Boston base in depth, with a suitable bridge or drawbridges, and authorizing also the filling of a strip of land outside the sea wall, the building of a new wall or embankment and the taking of the intervening land for a public park, the various works authorized were treated by the Legislature as parts of a single project for the public good, the building of

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the embankment and the construction of the park being natural if not necessary incidents of the change in the level of the water.

The proprietors of land upon the Charles River Basin in Boston, who under St. 1850, c. 317, became owners in fee to the sea wall, did not acquire by that or other statutes any rights beyond those of ordinary riparian proprietors on a navigable river where the tide ebbs and flows.

FOUR PETITIONS, filed in the Superior Court respectively on November 25, December 9, December 11, 1908, and February 26, 1909, under St. 1906, c. 402, § 4, for the assessment by a jury of damages suffered by the several petitioners by reason of the work done by the Charles River Basin commissioners under authority of the provisions of that chapter, the petitioner in the first case being the owner of a lot of land bounded on the north by Revere Street, in Boston, on the east by Charles Street, on the south by Pinckney Street and on the west by the Charles River, the petitioner in the second case being the owner of a lot of land on the northerly side of Beacon Street numbered 424, and bounded northerly on the harbor commissioners' line, the petitioner in the third case being the owner of a lot of land on the northerly side of Beacon Street bounded southerly by Beacon Street and northerly by the Charles River, and the petitioner in the fourth case being the owner of a lot of land on the westerly side of Brimmer Street numbered 19, bounded easterly by Brimmer Street and westerly by the Charles River.

On page 424 is a reduced copy of a plan, used at the argument, showing the changes in the Charles River Basin.

In each of the cases the Commonwealth demurred to the petition. At different times between December 28, 1908, and March 1, 1909, each of the cases came on for argument before *Richardson*, J. In each case he ordered that the demurrer to the petition be overruled, and, being of opinion that the orders ought to be determined by this court before any further proceedings in the Superior Court, by agreement of the parties he reported the cases to this court for such determination.

The cases were argued together before this court on March 9, 1909.

F. Rackemann & H. M. Davis, for the Home for Aged Women.

A. Whiteside, (*W. I. Nottage* with him,) for Ralph B. Williams.

W. H. Dunbar, for George Wigglesworth and others, trustees.

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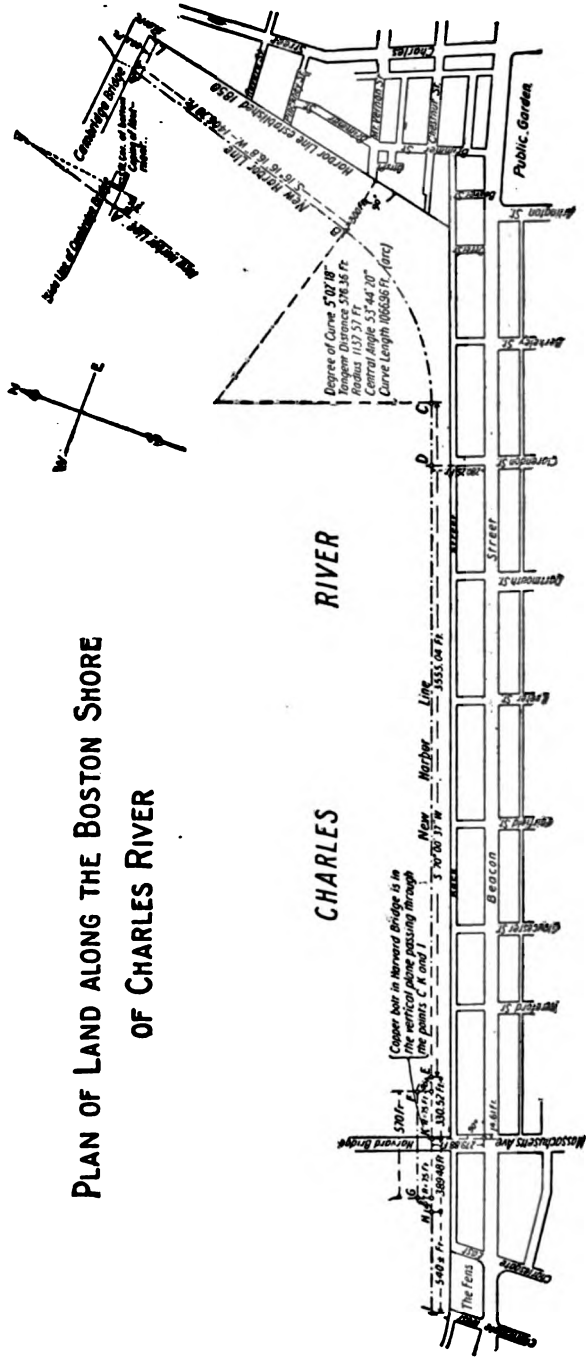
PLAN OF LAND ALONG THE BOSTON SHORE OF CHARLES RIVER
CHARLES RIVER
Public Garden
Beacon Street
Harvard Bridge
Massachusetts Ave
The Fens
Degree of Curve 5°07'18"
Tangent Distance 576.36 ft.
Radius 1137.51 Ft.
Central Angle 53°44'10"
Curve Length 1066.96 Ft. (arc)
Copper bolt in Harvard Bridge is in the vertical plane passing through the points C A and I
Near Harbor Line 3355.04 Ft.
S 3°-0'-00" W
S 16° 16' 15" W 1234.87
Cambridge Bridge
Boston Light
Near Harbor Line established 1890

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H. W. Brown, (*J. Noble, Jr.*, with him,) for Robert C. Heaton and others, executors, cited *Lyon* v. *Fishmongers' Co.* 1 App. Cas. 662; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; *Yates* v. *Milwaukee*, 10 Wall. 497; *Scranton* v. *Wheeler*, 179 U. S. 141; *Brisbine* v. *St. Paul & Sioux City Railroad*, 23 Minn. 114; *Union Depot Co.* v. *Brunswick*, 31 Minn. 297; *Meyers* v. *St. Louis*, 8 Mo. App. 266; *S. C.* 82 Mo. 367; *Rumsey* v. *New York & New England Railroad*, 133 N. Y. 79; *Sage* v. *Mayor of New York*, 154 N. Y. 61; *In re City of New York*, 168 N. Y. 134; *Chapman* v. *Oshkosh & Mississippi River Railroad*, 33 Wis. 629; *Bedlow* v. *New York Floating Dry Dock Co.* 112 N. Y. 263; *Langdon* v. *Mayor of New York*, 93 N. Y. 129, 144, 145, 152–154.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, for the Commonwealth.

KNOWLTON, C. J. Each of these petitioners is an owner of land extending northward, or westward, to the line of the sea wall on the southerly side of the Charles River in Boston, which wall runs from a point in the southwest corner of the stone wall of the Charlesbank, westerly to the easterly line of the Back Bay Fens. This wall, opposite the land of the several petitioners, is northerly, or westerly, of and below the line of low water. The Charles River Basin commission, acting under the St. 1903, c. 465, as amended by the St. 1906, c. 402, filed in the registry of deeds for the county of Suffolk a taking in fee of a strip of flats and lands covered by tide water, northerly of this sea wall, so far as these flats and lands are owned by private individuals or corporations other than the city of Boston, with the rights, easements, privileges and appurtenances, if any, within the limits of said parcel, so far as they belong to private individuals and to corporations other than the city of Boston, with certain exceptions not now material.

These are petitions for an assessment of damages caused to the property of the several petitioners by the taking. The Commonwealth filed a demurrer in each case, on the ground that it does not appear from the petition that any lands or rights in lands of the petitioner have been taken by the respondent. The petition in each case shows that no part of the parcel of land within the boundaries of the petitioner is included in

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the portion taken by the commissioners. The averment is that riparian and other rights, easements, privileges and appurtenances of the petitioner were annexed or appurtenant to and parcel of its estate, by reason of the situation of the property adjacent to the sea wall, and beyond to the northward, and by reason of the fact that this property was a part of the Charles River and of the navigable waters of the Commonwealth. Without stopping now to consider the legislative acts and the consequent proceedings whereby the petitioners acquired a title to lands or flats beyond the original line of low water, we will treat the petitioners as severally having an estate in fee to the line of the sea wall.

We come at once to the question, what rights had they, if any, as riparian proprietors on the river, in these navigable waters where the tide ebbs and flows. The general rules of law as to ownership along the shore of the sea, and in bays, harbors and inlets, both at common law and under the Colonial Ordinance of 1641–1647, have been considered repeatedly in this court by judges of great learning and ability. *Commonwealth* v. *Charlestown*, 1 Pick. 179, 182, 184. *Commonwealth* v. *Alger*, 7 Cush. 53, 65. *Commonwealth* v. *Roxbury*, 9 Gray, 451, and note. It is unnecessary to repeat at length the conclusions which have been reached and stated by the court. It will be necessary, however, to consider certain general doctrines, and to apply them to questions, some of which arise now for the first time in this Commonwealth.

Under the early colonial charters, all rights belonging to the English government were conferred upon its representatives in this country. The title of the king, both the *jus publicum* and the *jus privatum*, with rights of regulation in Parliament in the interest of the people, came to the colonies, and afterwards passed to the several States. The fee in the land under tide waters has remained in the Government, as the representative of the people, for the public use, except as affected by the Colonial Ordinance of 1647 and by private grants. *Commonwealth* v. *Roxbury*, 9 Gray, 451, 483. Before the adoption of that ordinance the ownership of individuals having grants on navigable waters stopped at high water mark. But by the ordinance "it is declared, that in all creeks, coves, and other places about and

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upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands." Anc. Chart. 148, 149. This title to low water mark, or to the distance of one hundred rods, is subject to rights of navigation, and fishing and fowling. *Butler* v. *Attorney General*, 195 Mass. 79. The right of such control as is necessary for the protection and promotion of navigation, over the flats in private ownership, is reserved to the Government, which represents the interests of all the people.

The waters and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the Legislature in these particulars has been treated as paramount to all private rights, and subject only to the power of the Government of the United States to act in the interest of interstate or foreign commerce. All rights granted to individuals by general laws are made subject to this paramount right of the Legislature to do what is deemed necessary for the promotion of navigation. The extension of private titles under tide water, by the ordinance of 1647, has made it proper for the Government to hold the rule of a paramount right of control of property beyond the line of private ownership more strictly than it is held in some of those States where private titles stop at high water mark.

The most important contention of the petitioners is that they have a right of access to deep water from their lands, and a right of access to their lands from the channel principally used for navigation. The waterway is a highway, and these petitioners, like every one else, have a right to pass over it in any direction. So long as this waterway extends to the line of their land, they have access to it and access to their land from it, by contiguity. So far as navigation is of importance in that place this right may have a value. It is a right which depends wholly upon the situation of their land. From this point of view, their right to pass over the water, considered by itself alone, is

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like that of every other member of the public who goes upon the water. But this right to pass over the water directly to and from the land, in connection with the use of the land, gives the land a special value. It is a use so far connected with the land as to be a special subject for a recovery of damage if there is a wrongful interference with it. It is a damage special and peculiar to the property, as distinguished from the general damage which comes from an interference with the right to pass up and down the river as the general public do. Interference of this latter kind would not entitle an owner to any individual damages, because he suffers from it only as one of the general public, his suffering being the same in kind as that of the public, although greater in degree by reason of the proximity of his property. *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1.

If, before this change was made by the Charles River commissioners, one had wrongfully put an obstruction along the front of the land of one of the petitioners, and thus had shut off communication with the main channel, this would have been, as against the general public passing up and down the stream, a public nuisance, which would have given individuals no private right of recovery. But, as against the petitioner, it would have been a private nuisance, causing him a special damage, for which he might have an action. *Wesson* v. *Washburn Iron Co.* 13 Allen, 95. This right of access to the highway, for travel by water, is analogous to the right of access to a highway on land. To an abutter on a street, the opportunity to pass directly from his land to the highway is an element of value in the land. If he does not happen to own any part of the fee of the street, the erection of a barrier on the street, along his front, to prevent passing to and from his land, would be, for the general public going up and down, a public nuisance, the inconvenience of which would give individuals no right of action. For him it would be a private nuisance, the maintenance of which would entitle him to compensation for his special damage in the use of his property. Under the liberal statutes of this Commonwealth, which give compensation for special and peculiar damages to those who suffer from the laying out or discontinuance of a street, or from the location and construction of a railroad, this element of value in the property, by reason of its contiguity to

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a street, is made a ground for claiming damage if the street is discontinued in front of the premises.

In a sense, there is a valuable right of access to the waterway or to the street, so long as the waterway or street is there. But it does not follow that the abutter on the waterway can insist that the Government shall make no change in the waterway on its own land, in the interest of more convenient and valuable navigation, which shall leave him with a less convenient passageway to the channel, or perhaps with no passageway at all. The Government has this paramount right to do what is necessary for the public good, in promoting better navigation. The benefits enjoyed by the abutting landowner are held subject to the possibility of diminution or loss by the exercise of this right. In like manner on a street, while no one can cut off the abutter from access to the street in front of his premises, it does not follow that the Government, having once laid out the street, is bound to maintain it there forever, and that, as against the Government, the abutter has acquired a right of property to have it so maintained for his individual benefit. The right of access by reason of his proximity, while the street remains there, gives his property value, derived in part from the probability that these conditions will remain. But if the public interest requires the discontinuance of the street, his right of access to it so long as it remains a street comes to an end. The street may be discontinued if the State determines that the public interest requires the discontinuance of it. Many members of the public may suffer from the discontinuance, property owners in the neighborhood, and others. An abutter on the part discontinued may suffer more than others, and his property may be so situated that he suffers special and peculiar damages, different from those of the public who are simply deprived of the right to pass longitudinally along the street. His damage may be such as to make it proper to give him compensation; but by the original construction of the street, he did not acquire, as against the Government, a new right of property, such that the discontinuance of the street will take from him a part of his estate that can only be taken under the right of eminent domain.

The erection of many kinds of public works increases the value of property in the neighborhood by reason of their prox-

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imity, and this increase is often a reason for a special taxation of real estate. After the erection of the South Terminal Station in Boston, there was special taxation upon real estate, covering a very large area, because of the increase of its value from the establishment of the station there. *Sears* v. *Street Commissioners*, 180 Mass. 274. If for good reasons, in the public interest, the Legislature should provide for the removal of this station, it can hardly be contended that the diminution of the value of property in the neighborhood would entitle the owners to compensation as for a taking of their property under the right of eminent domain.

An element of value in the property by reason of its situation in reference to public works or to other desirable property in the neighborhood, such that an unlawful act affecting people in the exercise of their public rights would affect it specially, and make that which is a public nuisance to others a private nuisance to this property, or such as would render a change in the other property, or in the public works, a cause of special and peculiar damage to this property, from a deprivation which would affect other persons or estates only generally, is to be distinguished from an element of value which is inherent in the property itself, apart from the relations of other property to it. This distinction has often been overlooked.

That the right of access to and from property so situated is held subject to changes in the condition of the public property, made under the paramount authority of the Government in the interest of better navigation, has been recognized by courts of high authority. In *Sage* v. *Mayor of New York*, 154 N. Y. 61, 79, the court said: "Although, as against individuals, or the unorganized public, riparian owners have special rights to tide water that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage when protected by a grant and covenant on the part of the State, as in *Langdon* [93 N. Y. 129] and *Williams* [105 N. Y. 419]. . . . So, it seems to me, when any public authority conveys land bounded by tidewater, it is impliedly subject to those paramount uses to which the Government,

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as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare." This states the well established law of New York. The fact that corporations serving the public under legislative authority are held in that State to have less rights as against individual property owners than the Government itself does not diminish the weight of this doctrine, as affecting cases like those now before us. The fundamental reason for the rule is the same as that in Massachusetts. Although early colonial grants are considered in the opinion, ultimately the right depends upon the inherent and paramount power of the Government, as the representative of the whole public, which power has always been retained by the Legislature, except when plainly limited by an express grant. The case of *Gibson* v. *United States*, 166 U. S. 269, which arose in Pennsylvania, fully covers the question which we are considering. A dike had been constructed, which substantially destroyed the landing of the claimant by preventing free ingress and egress to and from the landing on and in front of the claimant's farm, whereby she had communication with the navigable channel of the Ohio River. The court said: "In short, the damage resulting from the prosecution of this improvement to a navigable highway, for the public good, was not a result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject." The doctrine is stated in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 642, in these words: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action." This case arose under the law of Illinois. The claim was for being deprived of access to the plaintiff's property on the side of the river and the side of the street, in connection with the construction of a tunnel under the Chicago River. The distinction between a right which will entitle one to compensation for an injury by a private person and a right which must be paid for by the Government, if property is affected by the exercise

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of governmental power, is referred to in the opinion. The case of *Shively* v. *Bowlby*, 152 U. S. 1, contains a statement of the law by Mr. Justice Gray, and an elaborate review of the authorities, by which it appears that there is some diversity in the laws of different States; but the doctrine stated in the above quotations is well supported by authority. In *Scranton* v. *Wheeler*, 179 U. S. 141, 163, 164, the opinion of the court contains this language: "If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case [10 Wall. 497], 'in due subjection to the rights of the public' — an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner." In the case before us, the changes were made below low water mark, outside of the line of the shore. See also *Barney* v. *Keokuk*, 94 U. S. 324; *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387; *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, 532; *Mills* v. *United States*, 46 Fed. Rep. 738.

The power of the Government to control, in the public interest, lands under tide water outside of the line of private ownership, under the colonial ordinance of 1647, has always been maintained by the Legislature and courts of this Commonwealth. *Commonwealth* v. *Charlestown*, 1 Pick. 179, 182, 184. *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91, 105, 106. *Commonwealth* v. *Roxbury*, 9 Gray, 451, 492, and note. *Commonwealth* v. *Essex Co.* 13 Gray, 239, 247. *Harvard College* v. *Stearns*, 15 Gray, 1. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 449. *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27. *Thayer* v. *New Bedford Railroad*, 125 Mass. 253. *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 365. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281.

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The petitioners place great reliance upon the English decisions in *Lyon* v. *Fishmongers' Co.* 1 A. C. 662, *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, and *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243. These cases arose under statutes referred to by the Lord Chancellor in his opinion in the first of them, in which valuable rights in property, by reason of its situation in reference to existing conditions, are recognized, and made a subject for compensation in damages when these conditions are changed under the authority of law. They are analogous to our own statutes which give damages for the laying out or discontinuance of highways, and for the location and construction of railroads, and for many other public acts, not only to those whose property is taken, but to those who suffer special and peculiar damages to their property which is not taken. Moreover, it has been recognized in earlier cases that the law of England is somewhat more liberal than that of Massachusetts in awarding damages for interference with advantages in the use of private property. *Brayton* v. *Fall River*, 113 Mass. 218, 227, 228. *Stanwood* v. *Malden*, 157 Mass. 17, 18. While these decisions recognize the existence of valuable riparian rights at common law in owners upon navigable streams, they do not indicate that these rights are paramount to the right of Parliament to make improvements in the stream, in the interest of navigation, over land belonging to the Crown, without compensation to riparian proprietors, and they do not require us to hold, under the colonial ordinance of Massachusetts, that a change by the Government in the flow of tide waters below low water mark is a taking of the property of a riparian owner, even if it cuts off direct access from his land to navigable water.

Thus far we have considered particularly the claim of the petitioners to damages for interference with their way of approach to a navigable highway. It is contended that they have other valuable rights as riparian proprietors. It is to be noticed, first, that the nature of their ownership on the border of tide water differs from the ownership of a riparian proprietor upon an unnavigable river or small stream. The title of the owner, in the latter case, goes to the thread of the stream, or if his estate extends beyond the stream, he owns all the land under the water, with a right to the flow of the water, which goes with

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the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them, except such as it has in all parts of its domain for governmental purposes. But the common law and the colonial ordinance give owners on the shore of the sea, or on navigable tide water in bays, harbors and inlets, only a limited right beyond the line of their private ownership. Their right is that of members of the public for whose benefit the property is held by the State, with such special advantages to their property in the use of these public rights as come from its contiguity. Their rights, to be used in connection with their property, like the rights of other members of the public, are subject to the paramount right of control of the Government for the public good, however the exercise of this right of control may affect the convenience of any individual. The principles which we have already stated are applicable to such benefits, of the kind enjoyed by a riparian proprietor upon a small stream, as pertain to the ownership of property on the shore of navigable tide water.

In so holding, we are able to stop far short of the decision in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, upon a question that never has arisen in any other case in this Commonwealth, in which it was held by a majority of the court that the Commonwealth's ownership of a great pond for a public use, under the Colonial Ordinance of 1641, gave it a right to divert all the water from the pond, without compensation to landowners on a stream below; so that a person having a perfect title to land miles away, over which a stream from the great pond flowed, might have a part of his property, namely, the natural flow of the water, taken off from his land without compensation. In the present case there is no change in the property within the boundaries of the petitioners' estates, and the adjacent land and water are held in a separate ownership, for a public use, under which it may be appropriated as the interests of the public require.

It is contended by the petitioners that the changes made by the commission were not made for the improvement of navigation, and therefore were not authorized, under the rules of law stated above. In the first place, we think it would be too strict

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a doctrine to hold that the trust for the public, under which the State holds and controls navigable tide waters and the land under them, beyond the line of private ownership, is for navigation alone. It is wider in its scope, and it includes all necessary and proper uses, in the interest of the public. In *Commonwealth* v. *Roxbury*, 9 Gray, 451, 483, Chief Justice Shaw, in speaking of the seashores and the land under the sea, said of the king, "that he held the same *publici juris* for the use and benefit of all the subjects, for all useful purposes, the principal of which were navigation and the fisheries." As the State is not only the holder of the title but the representative of the people, it may exercise the police power over the property, for their good. The rights of individuals, both in their persons and in the use of their property, are subject to the exercise of the police power.

The change in the Charles River under these statutes was for the improvement of navigation as well as for other useful purposes. If that was one of the purposes of the Legislature, it was enough to warrant the legislation and the action under it, even if such a change in the river could not be authorized, for the other useful purposes alone, without compensation to these petitioners. The statute under which action was taken provided, first, for the erection of a dam sufficiently high to hold back all tides and to maintain, in the basin above, a substantially permanent water level, not less than eight feet above Boston base. A suitable lock was to be built, not less than three hundred and fifty feet in length between the gates, forty feet in width, and thirteen feet in depth below Boston base, with a suitable drawbridge or drawbridges. This was designed greatly to improve navigation, in a place where, previously, it had been precarious. Connected with the plan there were doubtless other important considerations, relative to the public health and the public comfort, which properly appealed to the Legislature as the representative of the police power. In the interest of safer and more convenient navigation over the flats along the Charles River, and of the public health and comfort, the construction of the dam and the filling of a strip of land outside of the sea wall were treated by the Legislature as parts of a single project for the public good. The building of a new wall or embankment and the taking of the intervening land for a public park are required by the same

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statute that directs the construction of the dam, and are natural, if not necessary incidents of the change in the level of the water. There was a sufficient reason, in the conditions and in the objects to be accomplished, for the exercise of the paramount power of the Legislature over the Commonwealth's lands under tide water.

The petitioners also contend that the statutes under which the sea wall was constructed, whereby their titles were severally extended to the wall, gave them rights beyond those of ordinary riparian proprietors where the tide ebbs and flows on a navigable river. We discover no good ground for this contention. Under the St. 1850, c. 317, they became owners in fee to the sea wall. Such advantages or disadvantages as came to their property from its situation at the edge of the water were theirs. But there was nothing to give them a title to anything beyond the stated line of their ownership. It is a familiar rule that grants by the sovereign are always to be construed strictly against the grantee. *Commonwealth* v. *Roxbury*, 9 Gray, 451, 492. *Cleaveland* v. *Norton*, 6 Cush. 380, 383.

It follows that there was no taking of the petitioners' property by the commission, and that they are not entitled to an assessment of damages under the statute. Very likely if the property along the sea wall near Beacon Street had been thought by the Legislature to have a special value, for use in connection with navigation, compensation would have been provided for the filling of the land, even though no private property is taken.

The statute calls for an assessment of betterments, growing out of the improvements to this property from these changes in the river, on which assessments it will be in the power of the petitioners to have the opinion of a jury.

In each case the entry will be

Demurrer sustained.

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GEORGE G. CROCKER & others *vs.* EDGAR R. CHAMPLIN & others.

Suffolk. March 11, 12, 1909. — June 1, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Flats. Colony Ordinance of 1647. Charles River Basin.

The owners of flats in this Commonwealth acquired by virtue of the Colony Ordinance of 1647 hold them subject to the right of the Commonwealth to cover them with deep water by means of a permanent dam maintained for purposes of navigation, and their diminution in value from being thus permanently covered with water is not a taking of property from the owners.

The owners of flats in the Charles River Basin, theretofore bare at low tide and valuable in furnishing sand and gravel for sale, were deprived of no property by the erection of the dam authorized by St. 1903, c. 465, as amended by St. 1906, c. 402, maintaining the water over the flats at a permanent depth of eight feet.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 14 and amended on October 31, 1908, by the owners in fee of two parcels of flats in Cambridge south and west of the West Boston Bridge and north and west of the thread of the Charles River, against the members of the Charles River Basin commission appointed under the provisions of St. 1903, c. 465, and directed by § 3 of that chapter to "construct across Charles River between the cities of Boston and Cambridge, a dam, at least sufficiently high to hold back all tides and to maintain in the basin above the dam a substantially permanent water level not less than eight feet above Boston base," the dam to occupy substantially the site of the former Craigie Bridge, to enjoin the defendants from closing the dam and raising the level of the water as proposed, thus depriving the plaintiffs of a profitable use of their property.

The case was heard by *Loring*, J., who made a memorandum of findings as follows:

"I find in this case that the plaintiffs are the owners of a valuable tract of flats in which there is a deposit of sand and gravel; that this sand and gravel is of a large area, so situated

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and of such a character that under natural conditions it could be excavated and sold at a profit; and that the property is a valuable one, if natural conditions continue.

"I also find as a fact that the imposition of this body of eight feet of water above these flats continuously adds materially to the cost of excavating the gravel, and materially diminishes the value of that property for this, the only purpose of value which the property has.

"But I think it is very clear that this St. of 1903, c. 465, was passed in the exercise of the police power of the State. Take § 6, which is the section under which the plaintiffs in this case contend that there ought to have been a taking of their land, — that section leaves out a provision that any person damaged by the acts done by virtue of this chapter shall have his compensation on bringing a petition. That section is restricted to giving authority to the public officers, who were charged with carrying out the scheme, a right to take property, and if property was taken then the owner had his petition for compensation. It leaves out the other clause which you find in the highway acts and in similar statutes, where the action taken is unquestionably one in the exercise of eminent domain, — that any one damaged by acts done under the authority given shall have his damages. I think, therefore, that it is clear from the terms of the act that the Legislature thought that they were exercising the police power in authorizing the construction of this dam and what went with it. What went with it I think is only of incidental importance here.

"The strength of the argument which the plaintiffs have addressed to me in this case is that the police power cannot be exercised to make a water park. The same idea was put forward in the contention that in regulating navigation the public can go no further than to make regulations as to how the water shall be used when it is over flats by force of natural causes. I differ from that entirely. I do not think it is true. I do not think it is true that the owner of flats has a right to the ebb and flow of the tide in its natural condition. On the contrary, I think that if the State, representing the public, thinks that the public right of navigation requires that the ebb and flow of the tide shall be regulated, it can, in the exercise of the public right

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of navigation, interfere with, check, or entirely exclude the ebb and flow of the tide.

"Take this very example, — it may be somewhat novel, but the principle seems clear to me, — take as an example the Charles River, and let us assume (and I think we can assume on the facts now before me) that the Legislature thought that the Charles River had become, so far as any useful purposes of navigation on the Charles River were concerned, — that the Charles River had become a river which ought to be devoted to that part of navigation which may be termed pleasure navigation, navigation for pleasure; and, having arrived at that determination of fact, they say 'That that use, that particular use, and kind of navigation, shall be the use to which in future we are going to devote the waters of the Charles River, and for that purpose, we will make such provisions as we think wise; in that connection we will provide for such commercial navigation as is consistent with this the best use of navigation of these waters, but only to that extent will we undertake to make provisions for commercial navigation; and, having that in mind, we therefore declare that we are going to have a good body of water continuously in the Charles River,' — I think it is within the police power of the State to do that. And I think that is what they did.

"I think that when this eight feet of water was placed over the flats belonging to these plaintiffs, it was put there by the authority of the State, under the police power of the State.

"Take another example: Suppose the Legislature desires to widen a river, which is an arm of the sea, and to deepen its waters to further navigation for commercial interests. If the Legislature find that it is cheaper to dam the stream (putting in the necessary lock or locks) than to dredge it, I cannot believe that it is not within the limits of the police power for them to do so.

"I agree entirely with the argument which has been addressed to me as to measuring the interference with the plaintiffs' right of property by taking averages of depth of water. I quite agree that the opportunity of taking away gravel and sand is much greater with an ebb and flow of the tide, which gives you at one moment no water over it, and at another eight or nine feet. I

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do not think it is fair to take the mean. But in my view it is within the police power of the State in regulating navigation to dam up the waters; and therefore I do not agree with the argument addressed to me on the part of the plaintiffs that they had, so long as the water is not there, the same right to that land as the owner of the upland has. I differ entirely from that argument. I think that is not true.

"I think, therefore, in this case, that the bill must be dismissed.

"I do not think that the plaintiffs are guilty of laches, and I so find."

The justice made a final decree that the bill be dismissed; and the plaintiffs appealed.

C. F. Choate, Jr., for the plaintiffs.

D. Malone, Attorney General, & *J. F. Curtis*, Assistant Attorney General, for the defendants.

KNOWLTON, C. J. This is a suit in equity to enjoin the defendants, who constitute the Charles River Basin commission, from increasing the depth of the water over the plaintiffs' flats, a large part of the time, by maintaining the dam required to be built by the St. 1903, c. 465, as amended by St. 1906, c. 402. The plaintiffs are the owners of many acres of flats in the Charles River, extending southward from the shore in Cambridge. These lie at such a level as to be, for the most part, just uncovered at low tide. The maintenance of the dam will keep them constantly covered, to a depth of about eight feet. Beneath a thin layer of mud, there is, in the flats, a valuable deposit of sand and gravel, which can be used in building, and from which the plaintiffs have been accustomed to take large quantities for sale, under a license from the harbor and land commissioners and another license from the secretary of war of the United States. The title of the plaintiffs to the flats is under the Colonial Ordinance of 1647, and it is not contended that the erection and maintenance of the dam will affect any of their property except that below high water mark, which is held under this ordinance. The commission has not taken any part of the property of the plaintiffs, unless the increase of the depth of the water a large part of the time constitutes a taking, and there is no provision in the statute for compensation for this effect upon their property. The power of the Legislature

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to authorize the erection and maintenance of the dam was considered at length in the *Home for Aged Women* v. *Commonwealth*, *ante*, 422, and it was held that the enactment of the law was a lawful exercise of the power of the government, for the improvement of navigation and for other public purposes. It appears from the evidence that it will materially benefit navigation for industrial and commercial purposes, as well as navigation for pleasure, which is equally within the control of the State, and is recognized and encouraged under our laws. *Attorney General* v. *Woods*, 108 Mass. 436, 439. The fact that considerations of the public health and the public comfort were also involved is immaterial in this case.

The question is whether this increase in the depth of the water where the tide ebbs and flows is a taking of the plaintiffs' property. Were it not for the rights acquired by the plaintiffs under the Colonial Ordinance, there would be no question. There would be a mere change in property held by the State for a public use. Did the extension of the boundaries of private ownership, under the Colonial Ordinance, take away from the State the right to make such a change, for the improvement of navigation, without providing compensation to individual owners under the ordinance? We are of opinion that it did not. This ordinance gave to the owners only qualified rights. Treating it as a grant, the rights of the public to have the benefit of the waters for navigation, fishing and fowling were reserved. *Butler* v. *Attorney General*, 195 Mass. 79, 83. These include a right to control the property, so far as is reasonably necessary in the interests of navigation. This is the substance of the decision in *Commonwealth* v. *Alger*, 7 Cush. 53, 89, 91, in which it was held that the Commonwealth might establish harbor lines over flats in private ownership that had not been built upon, and exclude the owner from any use of them inconsistent with the most advantageous use that the public might make for purposes of navigation. This doctrine has been embodied in our legislation and in our decisions. R. L. c. 96, §§ 8, 14, 25. The statutes of the United States rest upon the same view of the law. U. S. St. of March 3, 1899, c. 425, § 10. 30 U. S. Sts. at Large, 1151. In *Boston* v. *Richardson*, 105 Mass. 351, 362, Mr. Justice Gray said: "Even a title in flats by grant from the

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colony or Commonwealth, is subject, so long as they have not been built upon, to the authority of the Legislature, for the protection of the harbors and of the public right of navigation, to prohibit the taking of sand or gravel from the shore, or the erection of wharves beyond certain lines. *Commonwealth* v. *Tewksbury*, 11 Met. 55. *Commonwealth* v. *Alger*, 7 Cush. 53. *Boston* v. *Lecraw*, 17 How. 426, 433."

Such owners are not entitled to have the flow of water continue in its accustomed manner if the interests of the public require a change for the improvement of navigation. *Fitchburg Railroad* v. *Boston & Maine Railroad*, 3 Cush. 58, 88. *Davidson* v. *Boston & Maine Railroad*, 8 Cush. 91, 105, 106. The result in this case does not depend upon a suggestion that action in the interest of the public health and of the public comfort was an exercise of the police power, and for that reason justified an appropriation of property for the public benefit without compensation. Restriction and limitation upon the use of property, and even the destruction of property without compensation, is allowable in the exercise of the police power, if the use or continued existence of the property is dangerous or very harmful to the public. But to take property which is harmless and is being properly used, and to appropriate it to the improvement of the public health, is a different thing. Such a taking and appropriation, although for an object which it is within the police power to accomplish, calls for compensation. If the effect of this erection were permanently to inundate the plaintiffs' houses and lands above high water mark, the purpose of the Legislature would leave the effect a taking that must be paid for.

Our decision rests upon the ground that this improvement in navigation was one which, apart from the ordinance of 1647, the Government would have had a right to make as owner of the soil and as the representative of the public, and that the ordinance creating private property in flats reserved this right for the benefit of all the people.

The decision in *Bent* v. *Emery*, 173 Mass. 495, had reference to a removal of the substance of the land of the plaintiff, and the appropriation of it, under the contract for dredging, to use in the filling of flats in another place. In *Butler* v. *Attorney Gen-*

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eral, 195 Mass. 79, 83, it is held that the private ownership of flats is subject to public rights, of which the right of navigation is one. The point under discussion was whether the public had a right to use the land on the beach for bathing, either under the water or along its edge. These cases are not at variance with the contention of the defendants.

Bill dismissed.

EZRA I. DUDLEY *vs.* NORTHAMPTON STREET RAILWAY COMPANY.

Hampshire. September 15, 1908. — June 21, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Automobile, Registration. *Negligence*, In use of highway, Trespasser. *Trespass*. *Way*, Public.

Whether St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, providing that no person shall operate in this Commonwealth an automobile or motor cycle upon any public highway or private way laid out under authority of statute, unless he has been licensed and his vehicle registered as required by the statutes, except that "any automobile or motor cycle owned by a non-resident of this State who has complied with the laws relative to motor vehicles and the operation thereof of the State in which he resides may be operated by such owner on the roads and highways for a period not exceeding fifteen days without the license" should be interpreted as giving to such non-resident owners merely one period of fifteen days after once coming into this Commonwealth before being forbidden to operate their machines here without a license, and as allowing only one total period of grace during the whole license year, or *whether* it should be construed more liberally by allowing non-resident owners to operate their cars without a license for a period of not more than fifteen days upon any and every occasion when they shall come into this Commonwealth, here was not decided.

A resident of Connecticut, who during sixteen days has been operating an automobile on the highways of this Commonwealth, except for a part of a day when he drove it to West Suffield, Connecticut, and the daytime of another day when he drove it to Brattleborough, Vermont, to attend a fair, and a day and a half when the machine was in a garage in this Commonwealth undergoing repairs, has operated an automobile on the roads and highways of this Commonwealth for a period exceeding fifteen days, within the meaning of St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, and therefore, although he may have complied with the laws of Connecticut relating to motor vehicles, if he has not complied with the requirements of St. 1903, c. 473, and acts in amendment thereof, he is a trespasser upon the highway.

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By the provisions of St. 1903, c. 473, as amended by St. 1905, c. 311, regarding the registering of automobiles and the licensing of operators thereof, the Legislature created a duty on the part of persons owning or operating automobiles toward other travellers upon the highways, and therefore one who owns and operates upon the highway an automobile not registered as required by those statutes is a trespasser and other travellers upon the highway owe him no duty excepting to refrain from injuring him by acts done with a wanton or reckless disregard of consequences.

TORT for personal injuries to the plaintiff and damage to his automobile resulting from a collision between it and an electric street car of the defendant. Writ dated March 3, 1906.

The case was tried before *Brown*, J. The material facts are stated in the opinion. At the close of the evidence the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in September, 1908, before *Knowlton*, C. J., *Morton*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

J. B. O'Donnell, for the plaintiff.

J. C. Hammond, (*T. J. Hammond* with him,) for the defendant.

SHELDON, J. It was provided by the statutes in force at the time of this accident that no person should operate an automobile or motor cycle upon any public highway or private way in this Commonwealth laid out under authority of statute unless he had been licensed to do so and unless his automobile or motor cycle had been registered as prescribed. Sts. 1903, c. 473; 1905, c. 311. But it was also provided by § 2 of the act last cited that "any automobile or motor cycle owned by a non-resident of this State who has complied with the laws relative to motor vehicles and the operation thereof of the State in which he resides may be operated by such owner on the roads and highways of this State for a period not exceeding fifteen days without the license," etc., required in other cases. The first question presented in this case is whether the plaintiff in operating his machine in this Commonwealth on the day of the accident was acting in violation of law.

He was a resident of Connecticut. He had complied with all the laws of that State, and had a right to operate his machine on the highways of this Commonwealth for a period not exceeding fifteen days. He came into this Commonwealth in his auto-

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mobile on Wednesday, September 13, and remained here until the day of the accident, September 29, except that on September 14 he drove to West Suffield, Connecticut, returning to Massachusetts the same evening, and that he went to Brattleboro, Vermont, on one day to attend a fair, staying there that day, but not over night. Each of these absences was merely a temporary visit to the other State, made with no intention of a permanent stay, and followed by a speedy return; and on each of these days he did actually operate his machine in this Commonwealth. After his return from Vermont and before the accident, his machine needed repairs, and was kept in a repair garage a day and a half for that purpose.

It is not necessary to determine whether the statute before us should be interpreted as giving to non-resident owners of motor cars who have complied with the laws of their own State merely one period of fifteen days after once coming into this Commonwealth before being forbidden to operate their machines on the roads of this Commonwealth without a license under its authority, and allowing only one total period of grace during the whole of the license year, or whether it should be construed more liberally by allowing non-resident owners to operate their cars without a license for a period of not more than fifteen days upon any and every occasion when they shall come into this Commonwealth. In either event, this plaintiff had exceeded his privilege. He made one visit here; and the running of his fifteen days was not interrupted by his temporary calls into other States. Nor can the period be extended by not counting the days on which his machine was laid up for repairs or on which for any other reason he did not actually operate it. He had driven it into this Commonwealth; within the meaning of the statute he was operating it during the whole of his stay. By no process of computation can it be claimed that his stay had lasted for less than sixteen days. It follows that he was acting unlawfully, in violation of the statutes referred to, at the time of the collision between his machine and the defendant's trolley car; and it must be determined whether his violation of law is necessarily fatal to his right of action.

The general rule was stated in *Newcomb* v. *Boston Protective Department*, 146 Mass. 596, that the plaintiff's unlawful act will

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prevent his recovery if it directly contributed to his injury. But there is a distinction between an unlawful act which is at least a contributing cause of the accident and one which is merely an attendant circumstance or a condition, though perhaps a necessary condition, of that accident. *McCarthy* v. *Morse*, 197 Mass. 332. *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448, 452, and cases there cited. *Biggio* v. *Boston*, 179 Mass. 356. And if we had before us simply the case of a plaintiff who was driving his vehicle on a public way in a manner forbidden by law or without appliances required by law, but who, while himself using all due care had been injured by an accident due solely to the negligence of a third person, his own violation of law not being a contributory cause of the accident but merely one of the conditions existing at the time, it could not be said that such a plaintiff was barred of recovery by the mere fact of his violation of the law. But that is not the case which is now presented. We are dealing here with a peculiar kind of vehicle which has only recently come into use, which requires unusual care in its management, and the presence of which upon the highways has been found to involve more than ordinary risks to other travellers. As was said by the Chief Justice, speaking for the full court in *Commonwealth* v. *Kingsbury*, 199 Mass. 542, 544, "Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travellers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulation of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different States with the approval of the courts. *Commonwealth* v. *Boyd*, 188 Mass. 79. *Christy* v. *Elliott*, 216 Ill. 31. *People* v. *Schneider*, 189 Mich. 673. *People* v. *Mac Williams*, 86 N. Y. Supp. 857."

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Accordingly the Legislature has dealt with this subject. The rights of these parties are governed by St. 1903, c. 473, as amended by St. 1905, c. 311, which was then in force, and to which we have already referred. But we must now look more closely at the provisions of this statute. We find that, as expressed in the title, it provides comprehensively for "the registration of automobiles and motor cycles and for licensing operators thereof." Section 1 requires that "all automobiles . . . shall be registered," and provides with much detail for the registration by the highway commissioners both of the machines with identifying numbers or marks and of the names of the owners. Section 2 allows a general registration to be made by manufacturers of such machines and by dealers therein. Section 4 provides for the licensing of operators or drivers; and by § 5 all unlicensed persons are forbidden to operate such machines. Sections 7, 8, 10 and 11, and St. 1905, c. 366, contain limitations upon the speed allowed and requirements of brakes and other appliances, manifestly intended as precautions to be observed for the safety of other persons upon the highways. Section 9 fixes penalties for any violation of the act. Thus far, the provisions of the act in question substantially resemble those of the Lord's day act formerly in force, which made travelling on that day illegal simply by imposing a penalty upon any one who did so. But § 3 of the act before us (St. 1903, c. 473) goes yet further, and expressly ordains that "except as otherwise provided herein no automobile or motor cycle shall . . . be operated upon any public highway . . . unless registered as above provided." This provision, in addition to the penalties fixed for any operation of unregistered machines, forbids their being operated upon the highway at all. We cannot avoid the conclusion that it was intended to safeguard persons who were lawfully using the highways from the serious risks of injury by machines of this character which were operated in defiance of the law, and the owners of which furnished no means by which they could be identified and compelled to make proper compensation for the injuries which by their violation of law or by their mere negligence they might cause to other travellers. The Legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as to persons

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lawfully using the highways, no other right than that of being exempt from reckless, wanton or wilful injury. They were to be no more travellers than is a runaway horse. *Richards* v. *Enfield*, 18 Gray, 344. *Higgins* v. *Boston*, 148 Mass. 484. The plaintiff as a mere trespasser upon the highway was there not only against the right of the owner of the soil and so liable to an action by him, but also against the rights of all other persons who were lawfully using the highway. He was violating a law made for their protection against him; accordingly, he was a trespasser as to them. It follows that the defendant, which was lawfully using the highway with its cars, owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property, that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness. *Sullivan* v. *Boston Elevated Railway*, 199 Mass. 73, 76. *Fitzmaurice* v. *New York, New Haven, & Hartford Railroad*, 192 Mass. 159, 162. *Massell* v. *Boston Elevated Railway*, 191 Mass. 491, 493.

It is difficult to see how § 3 of this act can be given any effect if it is not construed as we have stated. Sections 1 and 9, requiring registration and fixing a penalty for any violation of the act, make of themselves the operation of an unregistered automobile unlawful, as in the case of the Lord's day act already referred to, and as in the failure to use bells upon a sleigh, under R. L. c. 54, § 3. But the purpose of the statute, to afford protection and adequate means of redress to all persons upon the ways, would not then have been fully accomplished. The additional prohibition was made, we must suppose, for the purpose of regulating the rights of travellers among themselves, whether they should be walking, driving vehicles drawn by horses, or operating automobiles. It is a reasonable assumption that the Legislature intended to put these forbidden and dangerous machines outside the pale of travellers, not merely for the purpose of the criminal law, but as regards all other persons rightfully upon the streets. The addition of the prohibition was well adapted for this purpose; if not so construed, it was merely a useless iteration of the legal effect of the other provisions of the same act. And our view is confirmed by the fact that the pro-

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hibition is not extended to automobiles which are merely travelling without the lights or other appliances required by §§ 10 and 11 of the act. The owner or operator may be liable to a penalty in that case; but the operation of the machine itself was not expressly forbidden.

The real question here is doubtless whether the Legislature has created a duty to other travellers upon the highways, or merely a public duty to be enforced in the ordinary administration of the criminal law, while civil rights and liabilities are left to be governed by the general rules which are applicable in such cases, between parties one of whom has been guilty of a violation of law. *Monroe* v. *Hartford Street Railway*, 76 Conn. 201, 206. *Frontier Steam Laundry Co.* v. *Connolly*, 72 Neb. 767. *Cook* v. *Johnston*, 58 Mich. 437. *Hayes* v. *Michigan Central Railroad*, 111 U. S. 228, 239. *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* 4 Exch. Div. 441. In our opinion the former is the case. *Banks* v. *Braman*, 188 Mass. 367. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596, 600, *et seq.*

As we consider that this case is governed by the peculiar provisions of St. 1903, c. 473, as amended by St. 1905, c. 311, we do not think it necessary to examine the decisions in *Marble* v. *Ross*, 124 Mass. 44; *O'Brien* v. *Hudner*, 182 Mass. 381; *Slattery* v. *Lawrence Ice Co.* 190 Mass. 79; *Jaehnig* v. *Ferguson Co.* 197 Mass. 364, and similar cases.

Of course the defendant would have had no right to run its car into the plaintiff's machine wantonly or recklessly; and that is the point of such cases as *Welch* v. *Wesson*, 6 Gray, 505, and *McKeon* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 271. But there was no evidence in the case at bar to warrant a finding for the plaintiff upon this ground.

Accordingly, the verdict for the defendant was rightly ordered; and we need not consider the somewhat doubtful question whether upon the evidence it could have been found that the plaintiff's conduct at the time of the collision was in other respects consistent with the exercise of due care on his part.

Exceptions overruled.

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WINFIELD S. CUTTS *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 13, 14, 1909. — June 21, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Street railway, Elevated railway. *Street Railway.* *Evidence*, Relevancy and materiality, Opinion: expert. *Witness*, Experts.

At the trial of an action by a passenger against a street railway company to recover for injuries alleged to have been caused by the plaintiff's being thrown from the front platform of a closed electric car as, after ascending for two hundred feet a four and a half per cent grade leading to the level of an elevated station, the car turned upon a curve and entered a loop which it had to traverse before it reached the platform used for the discharge of passengers, and continued upon the curve on a ten per cent upward grade, there was evidence tending to show that the plaintiff knew of a sign on the door of the car reading, "All persons are warned not to enter or leave the car while it is in motion, or by the front platform," that he knew that in going upon the front platform while the car was in motion he took more risk than if he had remained in his seat, that he was in no particular hurry, but wanted to catch a connecting elevated train if it was there, that, ever since the incline and curve and loop had been in use by the defendant, in case of almost every car that went up the incline, half of the passengers went out upon the front platform and half upon the rear platform while the car was in motion, and that the plaintiff knew of that fact at the time of the accident; that he went upon the front platform and was about to take hold of the handle of the dasher of the car, when the motorman shut off his power and then suddenly turned it on fully, causing the car to jerk forward in an unusual manner and causing the plaintiff to lose his hold and, there being no gate to prevent him from doing so, to fall off the car. *Held*, that the questions, whether the plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury.

A passenger on an electric street car who, while in the exercise of due care he was upon the front platform of the car as it approached a station and was preparing to alight, was thrown from the car by reason of negligence of the motorman in the management of the car, is not precluded from recovering from the company operating the car by reason of the existence of a rule of such company that "All persons entering or leaving this car while it is in motion or by the front platform do so at their own risk," if it appears that the rule was not properly posted in the car, and that the plaintiff did not know of its existence. As to whether there could have been any recovery if the rule had been properly posted, the court expressed no opinion.

A rule of a street railway company, "All persons entering or leaving this car while it is in motion or by the front platform do so at their own risk," set forth in the last two lines of five-line signs on four panels below the front and rear windows of a closed elevated car, so that the two lines in question were about twenty-eight inches above the floor of the platform, is not properly posted.

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A rule of a street railway company, "All persons are warned not to enter or leave this car while it is in motion, or by the front platform," is not a notice that persons entering or leaving the car while it is in motion or by the front platform do so at their own risk.

Evidence that for two or three years, ever since an incline leading to a curve and loop of the track and to a platform for the discharge of passengers at an elevated station of a street railway company had been in use by the company, half of the passengers in almost every car that ascended the incline had gone out upon the front platform of the car and half upon the rear platform while the car was in motion, tends to show that a rule of the company "All persons are warned not to enter or leave the car while it is in motion, or by the front platform," had been waived by the company at least as to such station.

At the trial of an action against a street railway company by a passenger upon a car to recover for injuries alleged to be due to the plaintiff's being thrown from the front platform of the car because, as the car on an incline entered a curve, which turned to the right from a straight track and then curved in a loop to the left, the motorman first shut off his power and then suddenly turned it on fully, causing the car to go forward with a sudden jerk, testimony of an expert offered by the plaintiff tending to show that, under the circumstances of the case, the plaintiff would have been thrown off the car, and not backward into the car, as the defendant contended he would have been according to a law of physics of which the defendant asked the court to take judicial notice, is competent.

TORT for personal injuries received by the plaintiff and alleged to have been caused by his being thrown because of negligence of the defendant from the front platform of a closed surface electric car, upon which he was a passenger, as it turned upon the curve of the southerly loop at Dudley Street Elevated Station in Boston after it had come up the incline from the street. Writ dated July 29, 1903.

The case was tried before *Aiken*, C. J. At the close of the evidence, he ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in January, 1909, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices.

H. I. Cummings, for the plaintiff.

W. G. Thompson, (*S. H. E. Freund* with him,) for the defendant.

LORING, J. On the morning of November 19, 1902, the plaintiff took a surface car of the defendant railway, which ran around the Dudley Street loop. His intention was to take an elevated train from Dudley Street to Scollay Square. He was a blacksmith by trade and the proprietor of a shop on Hawkins

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Street, was thirty-nine years of age and familiar with the defendant's station at Dudley Street. He was on his way to his day's work and had a "bundle of lunch" in his hand.

To reach the level of the elevated trains the surface cars ascend at a four and a half per cent grade for two hundred feet, to a point which is practically the beginning of the curve of the loop. From that point, for the distance of about one hundred and fourteen feet, the grade is two per cent; then for ninety-five feet the track is level, and then the down grade begins.

The plaintiff testified that the car on which he became a passenger started up the incline at the rate of about seven to eight miles an hour. He left his seat in the centre of the car and went out on to the front platform, carrying his "bundle of lunch" in his right hand. The gate on the left was shut; that on the right was open. As he went through the door on to the front platform, the motorman shut off his power. That was before the car began to go around the curve. He "was about to take hold of" the handle of the rail of the dasher when the motorman threw on his full power and that "brought the car up suddenly with a jerk, something unusual, a very quick jerk," the plaintiff was thrown back by it, it caused him "to lose my hand hold," to quote his own words, "and the sway of the car, together with that, threw me off" on to a workman's platform on the right of the track. "As near as I can remember I struck on my feet, but no sooner did I strike than I was down and it seemed to give me some sort of a peculiar twist around and my legs, one of them, suddenly swung right over the rail, and the wheel cut it off between the foot and the knee, and cut the heel off the shoe on the other foot, and scarred my heel considerably, and scarred my legs more or less all over, and tore my clothing to pieces."

He further testified that after the motorman shut off the power the speed decreased about one half. That he knew that the motorman put on the full power when he put on the power after slowing down, because he "heard the handle or lever go round and strike a stop on the box there." He thought the place where he fell was eight or ten feet beyond the place where the workmen's or raised platform begins; that he was lying there after the car passed. On cross-examination he testified that he had no hold of anything at any time. He further testified that he had seen

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passengers riding on the front platform on other occasions; that in case of "most every car that goes up that incline" half the passengers go out on to the front platform and half on to the rear platform while the car is still in motion; that this was true before and "at the time of the accident." That this had been true for two or three years, ever since the road was opened. That he was the first man out on the front platform on the morning of the accident. That after the accident the car stopped within fifteen feet of where he lay. He further testified that he knew that in going on to the front platform as he did he took more risk than he would have taken had he remained in his seat in the car, especially on a curve. That he was in no particular hurry, but he wanted to be ready to get off when the car got to the station where passengers cross to the elevated train, because he wanted to catch the elevated train if there happened to be one ready to go. That when he went off the car he "went off clean and quick." He knew that it was usual for the motorman to shut off his power and for the cars to slow down when they came to the curve, and for the power to be put on afterwards and the speed to be increased.

1. We are of opinion that on this testimony it was a question for the jury whether the plaintiff was guilty of contributory negligence. *Fleck* v. *Union Railway Co.* 184 Mass. 480. See also in this connection *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444; *Wilde* v. *Lynn & Boston Railroad*, 168 Mass. 533; *Mason* v. *Boston & Northern Street Railway*, 190 Mass. 255.

2. A majority of the court is of opinion that the jury would have been warranted in finding that the motorman was guilty of negligence which was a cause of the accident. The plaintiff cannot complain that the car did not maintain a uniform rate of speed. That is true under ordinary circumstances, *McGann* v. *Boston Elevated Railway*, 199 Mass. 446, and was peculiarly true, and true to the knowledge of the plaintiff, in case of a car ascending the incline in question. If all that appeared in evidence in the case at bar had been that the car slowed down as the plaintiff came through the door on to the front platform and then started with a jerk which with the sway of the car threw him off the car, the case would have come within *McGann* v.

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Boston Elevated Railway, 199 Mass. 446, *Stevens* v. *Boston Elevated Railway*, 199 Mass. 471, and *Hunt* v. *Boston Elevated Railway*, 201 Mass. 182. In such a case the evidence does not go far enough to warrant a finding that the motorman was negligent in the manner in which he started the car. Where the evidence goes further and shows that the motorman was negligent in the way he started the car there is a case for the jury. *McGann* v. *Boston Elevated Railway*, 199 Mass. 446, 448, 449. *Stevens* v. *Boston Elevated Railway*, 199 Mass. 471, 475. *Lacour* v. *Springfield Street Railway*, 200 Mass. 34. If the motorman, when starting ahead after slowing down, in fact threw on the whole power at once and with a rush in place of putting it on slowly, we cannot as matter of law rule that he was not negligent in the way he started the car ahead. The evidence warranted a finding that the motorman did start ahead in that way. The plaintiff testified that, after slowing down, the motorman "threw on his full power which brought the car up suddenly with a jerk, something unusual, a very quick jerk, which of course threw me back, caused me to lose my hand hold, and the sway of the car, together with that, threw me off"; that he "heard the handle or lever go round and strike a stop on the box there"; and that he "went off clean and quick." The same act of negligence was the negligence in *Beal* v. *Lowell & Dracut Street Railway*, 157 Mass. 444. The learned counsel for the defendant has urged that the time when the plaintiff testified that the full power was put on was at a time when the combined retarding effect of the up grade and of the curve was at the maximum, and so the danger of increasing the speed was at the minimum, and that this double retardation "is at once the justification for a more sudden putting on of the power and the protection against what on a straight rail would be its danger." That may be so and yet we do not know, and therefore cannot hold as matter of law, that the proper way, or a proper way, of putting on the power under those circumstances is to put it all on at once and with such a rush that when the lever comes up against the stop it can be heard.

3. We do not find it necessary to decide whether the plaintiff's counsel did or did not agree that there was a sign on the panel below each one of the four windows, two opening on the front

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and two on the rear platform, stating that "All persons entering or leaving this car while it is in motion or by the front platform do so at their own risk." The plaintiff testified that he did not know of the terms of these notices nor of their existence.

The defendant has argued at great length that a passenger is bound by a rule of the carrier not known to the passenger, which provides that if the passengers ride in a certain place they do so at their own risk.

Doubtless a carrier can make reasonable rules for the conduct of its business, and its employees can justify any action necessary to enforce them. *O'Neill* v. *Lynn & Boston Railroad*, 155 Mass. 371, 373, where the earlier cases are cited.

But a different question arises when the carrier, to cut down its liability to a passenger, invokes one of its rules that passengers riding in a specified place do so at their own risk.

It appeared in *Burns* v. *Boston Elevated Railway*, 183 Mass. 96, *McDonough* v. *Boston Elevated Railway*, 191 Mass. 509, *Pike* v. *Boston Elevated Railway*, 192 Mass. 426, and *Tompkins* v. *Boston Elevated Railway*, 201 Mass. 114, that the plaintiff in fact knew of that rule.

The defendant contends that it is enough that the rule was properly posted, and that in such a case a passenger is bound by it even if he did not in fact know of it.

However that may be, we are of opinion that the jury could not find that it was so posted. These signs were on four panels on the outside of the car, below the two windows opening on to the platforms. The rule here relied on is set forth in the two lower lines of the notice which in all consists of five lines. The top line of each sign was thirty-two or thirty-three inches above the floor of the platform, and these two lines were four and a half inches below the top of the sign. That is to say, the rule here in question was set forth in two lines twenty-seven to twenty-eight inches above the floor of the platform, or at a height between the knee and the waist of an ordinary man. It would not be seen by a passenger who went immediately into the car and took a seat. It would be seen only by passengers standing on the platform. For such passengers it would be partly hidden by the gate, when it was shut across it, and by passengers, if any, who stood in front of it.

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4. The plaintiff admitted that he knew of the notice on the glass of the door. But the terms of that notice were: "All persons are warned not to enter or leave this car while it is in motion, or by the front platform." That is not a notice that persons entering or leaving the car while it is in motion or by the front platform do so at their own risk, as is strenuously urged by the learned counsel for the defendant company. A warning not to do an act is not a warning that one who does the act does it at his own risk. A warning not to do an act is at most notice of a rule forbidding the act. There was ample evidence that that had been waived. *McNee* v. *Coburn Trolley Track Co.* 170 Mass. 283. *Sweetland* v. *Lynn & Boston Railroad*, 177 Mass. 574. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93.

5. It is not necessary to decide whether the presiding judge was wrong in excluding the evidence stated in the plaintiff's offer of proof. The plaintiff's counsel has stated at length what he intended to cover by that offer of proof. And as the case must go back for a new trial we shall consider what the plaintiff intended to prove. What he intended to set forth in his offer of proof was: "To show by an expert that the construction of the car permitted of a play of the body on the trucks, and that in passing over the curve the wheels would jam and grind against, first, the left hand rail, then the right hand rail, etc., alternately, and that this alternate motion, by reason of the play between the trucks and the car body, would be reproduced on a larger scale in the latter; so that, although the car was passing on a curve to the right, it would be perfectly possible for the plaintiff to be thrown or twisted off in that direction if this side play of the car body should happen to be in that direction when he got the effect of the sudden jerk ahead. That is, the result of the two forces might have thrown him off as he claimed he was thrown."

The defendant in the argument at the bar of this court contended that "the court should take judicial notice" of the "fact that any sudden acceleration of speed on a curve of this character tends to throw a body on the car in unstable equilibrium, not outward, but inward."

We are of opinion that the evidence which the plaintiff says he meant to offer would have been competent to negative the

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law of physics of which the defendant asks the court to take judicial notice, and so to warrant a finding that the plaintiff was thrown off by the starting of the car.

Exceptions sustained.

METROPOLITAN COAL COMPANY *vs.* E. F. BILLINGS, trustee.
E. F. BILLINGS, trustee, *vs.* METROPOLITAN COAL COMPANY.

Suffolk. November 9, 1908. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Contract, Performance and breach. *Strike. Damages.*

Where by a contract in writing made on May 22, 1902, a coal dealer agreed to deliver before November 1 of that year an amount of coal sufficient to fill the bins in a certain building with furnace and stove coal to their full capacity, and the contract contained a condition that the seller should not be responsible for the delivery "if prevented by strikes or combinations of miners," and from the middle of May, 1902, until November 26, 1902, a strike of miners in the coal mines of Pennsylvania wholly interrupted the ordinary supplies of coal of the dealer, but he had on hand at all times during the period of the contract quantities of coal of the proper grades equal to or greater than the amounts called for by this contract and was equipped with teaming and transportation facilities sufficient for the delivery of such coal at the premises of the buyer, it was *held*, that the contract of the seller toward the buyer was performed in full, if during the strike the seller apportioned all his available supplies of coal among his regular customers and those persons with whom he had contracts when his contract with the buyer was made and gave to each his fair and proportionate share of the seller's available supplies, and if he delivered to the buyer during the period covered by the contract his fair and proportionate share of such supplies.

A so called strike clause in a contract for the delivery of certain coal during a period named, stipulating that the seller shall not be responsible for the delivery of the coal "if prevented by strikes or combinations of miners," relieves the seller from his obligation to deliver to the buyer during a strike of miners more than the buyer's due proportion of the supplies of coal which the seller has on hand or has reason to anticipate that he can obtain by the exercise of proper effort, but a strike during the period fixed for delivery has no effect to extend such period beyond the time limited by the contract.

By a contract in writing made on May 22, 1902, a coal dealer agreed to deliver before November 1 of that year an amount of coal sufficient to fill the bins in a certain building. The contract contained a condition that the seller should not be responsible for the delivery "if prevented by strikes or combinations of miners." From the middle of May, 1902, until November 26, 1902, a strike of miners in the coal mines of Pennsylvania wholly interrupted the ordinary supplies of coal of the dealer, but during the period covered by the contract he apportioned all his available supplies of coal among his regular customers and those persons with whom he had previous contracts and gave to each, including

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the buyer under the contract in question, his fair and proportionate share of the seller's available supplies. On October 31, 1902, the seller notified the buyer that for all coal delivered after November 1, 1902, he should charge the buyer the market price. He did so, and, on the buyer refusing to pay such price, brought an action to recover it. *Held*, that, if, after receiving the notice from the plaintiff, the defendant ordered coal that was delivered after November 1, he was liable for the market price, although he intended that such coal should be treated as delivered under the contract, because the obligation of the plaintiff to deliver under the contract terminated on November 1, and he had performed his whole duty under the contract up to that time, the strike, which did not terminate until after the termination of the contract, having excused him from delivering to the defendant more than his proportional share of the plaintiff's coal on hand.

MORTON, J. These are actions of contract and were tried and have been argued together. That by the coal company is to recover a balance alleged to be due for coal sold and delivered to the defendant. That by Billings is to recover damages for the alleged breach by the coal company of a written contract between him and it for the sale and delivery of coal by it to him. There was a verdict for the plaintiff in each case, though that for Billings was less than he claimed, and each case is here on exceptions by Billings to the admission of evidence, to the refusal of the presiding judge * to give certain rulings asked for, and to certain instructions that were given. We shall speak of the coal company as the plaintiff and of Billings as the defendant.

The contract was contained in two letters, — one from the plaintiff to the defendant dated May 10, 1902, offering, subject to certain terms and conditions relating to strikes, interruption of transportation,† etc., "to furnish the defendant's house at No. 409 Marlboro St., with such quantity of coal as can be

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* *Wait*, J.

† The strike clause contained in the offer and accepted as a part of the contract was as follows:

"Terms and conditions for the sale and delivery of coal.
All contracts are subject to these terms.

"Every reasonable effort will be made for the prompt and faithful fulfilment of contracts, but the seller will not be responsible for the delivery of the same if prevented by strikes or combinations of miners, laborers or teamsters, or interruption of transportation or navigation, or from any cause or any occurrence beyond his control. In such cases the obligation to deliver coal under such contracts is thereby cancelled to an extent corresponding to the duration of such interruption, and no liability shall be incurred by the seller for damages resulting therefrom."

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delivered previous to Nov. 1st next at the following prices," etc., and the other from the defendant to the plaintiff dated May 22, accepting the offer thus made and saying that the defendant would "take somewhere between 50 and 75 tons at 409 Marlboro St. before Nov. 1st," and concluding as follows: "The strike need not interfere with this as we shall not need more than 5 tons, and probably not that, until fall, but if at any time you wish to put in what our bins will hold, you may consider yourselves at liberty to do so." The terms of this letter were accepted by the plaintiff, and it was agreed between the parties at the trial that the words "such quantity of coal as can be delivered previous to Nov. 1st next" meant an amount of coal sufficient to fill the bins with furnace and stove coal to their full capacity, and such additional amount as was necessary to run the building until November 1.

The questions at issue arise out of the "strike clause" so called in the contract, and the rights and obligations of the parties in reference thereto.

1. At the trial it was admitted that at all times from May 22, 1902, to November 1, 1902, the Metropolitan Coal Company had in its possession in the city of Boston quantities of coal of the proper grades, equal to or greater than the amounts called for by its contract with Billings, and that at all times during that period it was fully equipped with teaming and transportation facilities sufficient for the transportation of such coal and its delivery at the premises of Billings.

The plaintiff offered evidence tending to show that from the middle of May, 1902, to November 26, 1902, because of strikes of miners at the coal mines in Pennsylvania from which its ordinary supplies of coal were obtained, its ordinary supplies of coal were wholly interrupted; that it did a business of about one million tons a year; that the requirements for its customers of the kind of coal called for by the contract during the time from May 22 to November 1 were about seventy-five thousand tons; that it had on hand and was able to obtain up to November 1 an amount of coal which was substantially thirty-one per cent of these requirements; that during those months in 1902 it apportioned all its available supplies of coal amongst its regular customers and those persons with whom it had contracts and gave

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to each his fair and proportionate share of its available supplies; and that the defendant had received his fair and proportionate share thereof. On this state of facts the plaintiff contended that by virtue of the strike clause it was excused from further liability to the defendant. This testimony was admitted against the objection of the defendant and subject to his exception, and its admission raises the question of evidence presented by the bill of exceptions.

The defendant contended, and at the close of the evidence asked the judge to rule, that the strike did not operate to excuse the plaintiff for failure to deliver coal to the defendant which it was under obligation to deliver to him from May 22 to November 1, 1902, if it had in its possession at Boston quantities of coal of the proper grades equal to or greater than the amounts it was under obligation to deliver to the defendant, and was fully equipped with teaming and transportation facilities sufficient to enable it to make such delivery. The judge refused to rule as thus requested and instructed the jury in substance and effect that, according to the contract, deliveries were to be made by the plaintiff from time to time from May 22 to November 1, and that, in entering into the contract as they did, the parties must be understood to have contemplated that the plaintiff would continue to carry on its business in the usual and ordinary manner with due regard to existing contracts and the demands of its regular customers; that the plaintiff was bound to make every reasonable effort to fulfil its contract, but that if, by reason of the strike, it was unable to do so, and apportioned its existing supply, and such supply as it reasonably expected to be able to procure, amongst those who had contracts at the time when the contract between the plaintiff and defendant was entered into and its regular customers, and the defendant had received his due proportion, then the strike would operate as an excuse for the non-performance of its contract by the plaintiff notwithstanding it had on hand at all times between May 22 and November 1 sufficient coal of the required grades to fill the contract between it and the defendant if that alone were to be taken into account. The judge also instructed the jury that as against the defendant the plaintiff would have no right to sell to new customers, and that any inability to fulfil its contract resulting

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from a desire to sell to others at higher prices or to relieve the necessities of others would not excuse the plaintiff from the obligation imposed on it by the contract. These instructions and the admission of the evidence which was objected to were well warranted by the decision in *Oakman* v. *Boyce*, 100 Mass. 477, which was followed by the judge in the trial of the case and in his charge to the jury. We see no reason to doubt the correctness of the rules there laid down. The case has recently been cited with approval by this court and similar rules have been applied elsewhere in like cases. See *Garfield & Proctor Coal Co.* v. *Pennsylvania Coal & Coke Co.* 199 Mass. 22, 41, 42, and cases cited. We do not regard the fact that the language of the contract in this case is "if prevented" and in the case of *Oakman* v. *Boyce* is "if prevented or obstructed" as sufficient on principle to distinguish that case from this. The object and effect of the contract in each case is to secure one of the contracting parties against liability to the other for damages for a breach resulting from causes beyond his control.

2. There was evidence tending to show that the plaintiff notified the defendant on October 31, 1902, that for all coal delivered after November 1, 1902, it would charge him the market prices, and that it did so, as set out in the declaration. The defendant, as there was also evidence tending to show, at all times objected to this, and at the trial contended and asked the judge to rule and instruct the jury that the obligation of the coal company to deliver the full amount of coal called for by the contract continued after November 1, and that for coal delivered after November 1 the plaintiff could only charge the contract price except for such as was in excess of the amount originally called for by the contract.

The judge refused, and we think rightly, to rule and instruct as thus requested. The strike continued, as already stated, till November 26, 1902. The contract expired on November 1. If coal that was delivered after November 1 was delivered and received as coal to which the plaintiff was entitled under the contract, then for such amount as was equal to that called for by the contract the plaintiff, as the jury must have understood from the charge, could only recover the contract price; but if, as the judge instructed the jury, the plaintiff gave the defendant notice

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that the market price would be charged for coal delivered after November 1, and the defendant, after receiving such notice, ordered coal that was delivered after November 1, then he would be liable for the market price, notwithstanding he intended that such coal should be treated as delivered under the contract and that he should be only liable for the contract price. The obligation of the plaintiff to deliver under the contract terminated as already observed November 1. If it had delivered to the defendant his proportion of existing and available supplies, then it was excused by the strike from any further performance of the contract. If it had not delivered to the defendant his due proportion, then to the extent to which the defendant had been damaged by such failure it was liable and the defendant could recover, and the judge so instructed the jury. The case would stand differently, if, as in *Rowland* v. *Lehigh Coal & Navigation Co.* 28 Penn. St. 215, relied on by the defendant, the strike had terminated before the time limited in the contract expired and the plaintiff could, within the time limited, by the exercise of reasonable effort have obtained coal enough to fill its contracts with the defendant and others, and to supply its regular customers. The effect of the strike was not to extend the defendant's right to delivery beyond the time limited but, according to the proper construction of the contract, to relieve the plaintiff from the obligation which it would otherwise have been under, and to render it liable only for its failure to deliver to the defendant within the time limited his due proportion of such supplies as it had on hand and of such supplies as it had reason to anticipate it could obtain by the exercise of proper effort. It follows from what we have said that the instruction that was given at the plaintiff's request as to the measure of damages * if the defendant was entitled to recover in the second action, and to which the defendant also excepted was correct.

8. The judge instructed the jury that, if they found that the defendant was entitled to recover, the damages should be assessed

* The instruction referred to was as follows: "If the coal company did not deliver to Mr. Billings his fair proportion, you are to determine how many more tons should have been delivered to him at the contract price, and then substract the contract price of those tons from the market prices charged; that is to say, in order to determine what his damages actually were."

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in the action brought by him against the plaintiff, and that they could not be allowed by way of recoupment in the action brought against him by the plaintiff. The defendant now contends that this instruction was erroneous. But no exception was taken to the instructions thus given. The exceptions saved were to the instructions so far as inconsistent with the requests that were made, and no request was made or objection taken in regard to this matter. No question as to the correctness of these instructions is, therefore, before us.

Exceptions overruled.

R. B. Stone, for the trustee.

C. E. Hellier, (*W. P. Everts* with him,) for the Metropolitan Coal Company.

HARRY W. WILLIS *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. November 20, 1908. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Due care of plaintiff.

In an action against a street railway corporation for personal injuries, from being run down by an electric car of the defendant, it appeared that the accident took place on a street running through a village on which the defendant maintained a single track. There was evidence tending to show that the car was going very fast, and one witness testified that it was going a mile a minute. It was a pleasant day in June. An approaching car could be seen for a distance of at least three hundred feet. The plaintiff was walking at the rate of from three to three and one half miles an hour and was driving a pair of horses which he intended to hitch to a plow. He lived nearby, and testified that he knew that cars were likely to come in either direction and that it was a place where cars came at considerable speed. He testified that just before he attempted to cross the track he looked and listened for an approaching car but saw no car and heard no whistle or other noise to indicate that one was approaching. On cross-examination he admitted that the car must have been in close proximity to him when he looked. When he was struck he was crossing the track diagonally with his back toward the approaching car. The evidence indicated that the horses got over the track safely and were not misbehaving, although they broke away and ran when the plaintiff was struck by the car. *Held*, that as matter of law the plaintiff was not in the exercise of due care and so was not entitled to go to the jury; that he must have stepped upon the track in front of a rapidly approach-

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ing car which was in plain sight, and, if he looked and listened, he must have done so carelessly, as, even if the car was running at the rate of a mile a minute, it must have been in sight when the plaintiff started to cross the track.

TORT for personal injuries from being run down by an electric car of the defendant between twelve and one o'clock in the daytime on June 4, 1907, at or near Main Street and Park Street in North Reading, when the plaintiff was driving a pair of horses, walking behind them, and was going to plow a field off Main Street, having taken the plow there earlier in the day, and having returned from the field to look for the spreader of the plow. Writ dated October 3, 1907.

In the Superior Court the case was tried before *Hardy*, J. The evidence is described in the opinion. At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make this ruling and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $2,750. The defendant alleged exceptions.

The case was argued at the bar in November, 1908, before *Knowlton*, C. J., *Morton*, *Hammond*, *Braley*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

E. P. Saltonstall, for the defendant.

J. E. Hannigan, (*I. Fox* with him,) for the plaintiff.

MORTON, J. At the time of the accident the defendant was operating a single track electric street railway between Reading and Lawrence. The track ran along the westerly side of Main Street through the village of North Reading where the accident occurred. Main Street runs nearly north and south and is crossed by Park Street at approximately a right angle, — the angle of intersection being a little nearer a right angle on the easterly side of Main Street than it is on the westerly side of the street. From a point opposite Park Street, Main Street is straight for about seventeen hundred feet in the direction from which the car came that struck the plaintiff. As one approached Main Street on the westerly side from Park Street, the view in the direction from which the car came was obstructed by trees and bushes. The witnesses did not agree how far one coming out of Park Street and crossing Main Street in an easterly direction could see just before stepping on to the first rail of the track in

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the direction from which the car came. It was undisputed, however, that an approaching car could be seen for a distance of at least three hundred feet. At the time of the accident the plaintiff had come out of Park Street and was crossing the track diagonally in an easterly direction with his back towards the approaching car. He was driving two horses, walking behind them and holding the reins. The day was a pleasant day in June and there was nothing either in the conduct of the horses or in the attendant circumstances to distract his attention. He lived nearby and, as he testified, knew that cars were likely to come in either direction and that it was a place where cars came with considerable speed. He testified that just before he attempted to cross the track he looked and listened for an approaching car but saw no car and heard no whistle or other noise to indicate that a car was approaching. There was evidence tending to show that the car was going very fast, — one witness testifying that it was going a mile a minute, which, if taken literally, would be hardly credible.

It is evident, we think, that the plaintiff must have stepped upon the track almost directly in front of a rapidly approaching car which was in plain sight. He acknowledged on cross-examination that the car must have been in close proximity to him when, as he testified, he looked. The case comes, it seems to us, within the class of cases in which it has been held that the plaintiff if he looked or listened must have done so carelessly and is consequently in no better position than if he had not looked and listened at all. *Beirne* v. *Lawrence & Methuen Street Railway*, 197 Mass. 173. *Fitzgerald* v. *Boston Elevated Railway*, 194 Mass. 242. *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533. *Mathes* v. *Lowell, Lawrence & Haverhill Street Railway*, 177 Mass. 416. *Roberts* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 296.

If we assume that no whistle was blown and that the noise of the car was not sufficient to attract attention, there is nothing except the plaintiff's carelessness to account for his failure to see the car, if he looked, as he testified that he did, just before crossing the track. The approaching car could be seen for several hundred feet, and there was nothing to distract the plaintiff's attention from his own safety. Even if the car

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was running at the incredible rate of a mile a minute, it would have been in sight as the plaintiff started to cross the track. To go three hundred feet, at which distance, as already observed, it was undisputed that an approaching car could be seen, would require at that rate of speed between three and four seconds. The distance from the place where the plaintiff could have seen the car just as he started to cross to the place where he was struck was between seven and eight feet, assuming that the track was of the ordinary width, and to pass over it, at the rate at which the plaintiff was walking, which was from three to three and a half miles an hour, as he testified, would have required not over two seconds. Even if, therefore, the car was going a mile a minute it must have been in sight when the plaintiff started to cross the track. If it was running at a less speed, it is still more evident that it was in plain sight. The case would perhaps have stood differently if it had appeared that the horses had been frightened at the approach of the car, and that the plaintiff while endeavoring to guide and restrain them had found himself upon the track in a place of danger from which he was unable or, in the confusion of the moment, failed to escape. But the case is not put on any such ground. On the contrary it would seem that the horses had got over safely and were not misbehaving, though they broke away and ran when the plaintiff was struck.

It follows, we think, that the plaintiff was not in the exercise of due care, and that the ruling requested by the defendant, that on all the evidence the plaintiff was not entitled to recover, should have been given. We have assumed in the plaintiff's favor that there was evidence of negligence on the part of the motorman.

In view of the grounds on which we rest our decision it has not seemed to us that anything would be gained by reviewing at length the cases relied on by the plaintiff, though we have given them due consideration.

In the opinion of a majority of the court the entry must be,

Exceptions sustained.

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HENRY H. SPRAGUE & others *vs.* JOSEPH F. MINON.

Suffolk. November 30, 1908. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Lake Cochituate. Boston. Eminent Domain.

The taking by the city of Boston of "all the waters of" Long Pond [now Lake Cochituate] and "all the water-rights thereunto belonging or in any wise appertaining" under authority of St. 1846, c. 167, with regard to the taking of certain waters by that city for the purposes of a water supply, deprived persons claiming a right to the use of such waters as grantees of the Natick Indians, to whom certain grants were made in 1659 by the General Court, of any such rights as they thus acquired, and brought them within the provision of St. 1846, c. 167, as to compensation.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 27, 1906, by the members of the metropolitan water and sewerage board to enforce certain rules and regulations of the board with regard to the use of Lake Cochituate.

In a decision reported in 195 Mass. 581, when the case was before this court upon a report by *Morton*, J., it was ordered that a decree be entered for the plaintiffs. Thereupon the defendant filed a petition to reopen the case, to discharge the report, upon which the case previously was decided, and to vacate the decree entered in accordance with that decision, in order that there might be a rehearing and trial and that evidence, newly discovered by the defendant, might be introduced, as stated in the opinion.

The petition was heard by *Morton*, J., and by him was reported for determination by the full court under the terms stated in the opinion.

E. C. Bumpus, for the defendant.

D. Malone, Attorney General, & *F. B. Greenhalge*, Assistant Attorney General, for the plaintiffs.

MORTON, J. This case came before this court and is reported in 195 Mass. 581. The question there presented was whether certain evidence offered by the defendant constituted or could be found to constitute, if competent, a defense. It was held that the evidence offered was incompetent and immaterial and

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a decree was ordered for the plaintiff. In the opinion then rendered Lake Cochituate was treated as a great pond and as a part of the public domain. The case comes before us now on a petition by the respondent to set aside and vacate the decree and discharge the report on which the case came up before and for a rehearing on the ground of newly discovered evidence tending to show, it is contended, that Lake Cochituate is not a great pond and that the board of metropolitan water and sewerage commissioners had therefore no right to pass the rules complained of because, as it is alleged, Lake Cochituate, formerly called Long Pond, was granted in fee in 1659 to the Natick Indians. The respondent also alleges that he has acquired by deed from descendants of those Indians the right to use the lake for fishing and boating and other purposes. The case was heard by a single justice upon the petition for rehearing and the petitioner's offer of evidence in support thereof and at the request of the petitioner was reported to this court upon the petition and such offer of evidence. "If the testimony offered by the petitioner would be adequate and material, upon proof, to control the decision of the full court heretofore made, then the case is to stand for hearing; if such testimony is not adequate or material in the premises, then the petition is to be dismissed, or such other disposition made of it as to the full court shall seem meet."

If it were necessary to pass upon the scope and effect of the grant of 1659 relied on by the petitioner (4 Mass. Col. Rec. 408, 409, 428) we should find difficulty in construing it as intended to convey to the Indians forming the plantation at Natick the fee of or any private rights in the great ponds included within the limits of the grant. By the Colony Ordinance of 1641–47 great ponds, meaning ponds of more than ten acres, had been set apart and devoted to the public use (*West Roxbury* v. *Stoddard*, 7 Allen, 158, *Attorney General* v. *Herrick*, 190 Mass. 307), and there is nothing in the grant itself or in the circumstances under which it was made to show any intention on the part of the General Court to except from its operation the tract granted to the Indians at Natick. The grant was to the "Indian Plantation called Naticke" as similar grants were to other plantations and towns. The Indians were allowed to

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make deeds subject to the consent of the General Court, and all of the lands included in the grant have been conveyed away by them; but the offer of proof contains no instance in which a deed was made of any part of what is now Lake Cochituate or of land under or rights in the same. A deed of a tract of about two thousand acres was executed by a number of Indians to one Rawson which, it is alleged, included great ponds. But, so far as appears, no private rights or interests in and to any great pond within the bounds described in that deed have ever been asserted in virtue thereof. The deed to Gookin and Howe of lands on the outlet stream conveyed no rights in the waters of the lake except such, if any, as would belong to any riparian owner on a stream flowing from a great pond. Complaints were made by the Indians that others trespassed upon their fishing privileges, and their claim to such privileges seems to have been allowed. But the claim seems to have been allowed rather because it was regarded as a necessary incident of their mode of life that they should have such privileges than as founded on any grant of private rights of property in the great ponds included within the plantation.

But whatever the exact nature of the title acquired by the Indians and their grantors in and to the tract granted to them in 1659 and in and to the waters of the great ponds included in said tract, we are of opinion that the taking by the city of Boston under authority of St. 1846, c. 167, of all the waters of Long Pond (now Lake Cochituate) and other brooks and streams whether permanent or temporary entering into the same, and of all bays, coves and inlets thereof, and of the outlets of the same and of all water rights thereunto belonging or in any way appertaining for the use and benefit of the city, operated to vest in the city of Boston any right or title in and to the waters of that pond belonging at the date of such taking to any individual or community however acquired. It was held in *Martin* v. *Gleason*, 139 Mass. 183, that a prescriptive right to pollute one of the streams entering the pond was included in the taking, and in the opinion in that case, speaking of the statute and of the words, "and any water rights connected therewith" with which the first sentence in § 1 of the act concludes, it is said "It was designed to give a broad and comprehensive authority, for the

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purpose of furnishing a supply of pure water for the city; and to confer the power to take everything included within the meaning of the antecedent words, so far as might be necessary for the preservation and purity of the water." The authority thus given was exercised in language as comprehensive as that in which it was conferred and "all of the waters of said Long Pond" and "all the water-rights thereunto belonging or in any wise appertaining" were taken for the sole use and benefit of the city. Any rights, therefore, which the petitioner or his predecessors in title may have had in or to the waters of Long Pond must be regarded as having been lost in consequence of, or extinguished by the taking by the city of Boston under and by virtue of the authority conferred upon it by St. 1846, c. 167. If the petitioner or his predecessors in title had any rights in the waters of Long Pond the taking necessarily deprived them of such rights and brought them within the provisions of that act as to compensation. It is not contended that the city did not have authority to take the waters of the pond. *Sprague* v. *Dorr*, 185 Mass. 10.

The defendant relies upon *Rockport* v. *Webster*, 174 Mass. 385. But no such question was presented in that case as was raised in this. In that case the question was whether the taking by the town of Rockport of the waters of Cape Pond, a great pond, under the provisions of St. 1894, c. 78, deprived the defendant, as one of the public, of the right to cut ice on the pond, and this court held that it did not, — adding, however, in the concluding paragraph of the opinion to prevent misconception that the decision was not inconsistent with the right of the plaintiff to have an injunction against the cutting of ice on the pond if it appeared in the future that the exercise of the right injuriously affected, or was likely to affect the purity of the water. In this case the question was whether, the waters of Lake Cochituate having been devoted to a public use, the Legislature had the right for the purpose of protecting the purity of the water to give the metropolitan water and sewerage board appointed under St. 1895, c. 488; St. 1901, c. 168, the power to exclude the public from using the waters of the pond for boating or otherwise, and it was held that the Legislature had such power and that there was nothing unreasonable in the regulations adopted by

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the board in regard to the use of the lake. So far from there being anything in *Rockport* v. *Webster* inconsistent with the former opinion in this case and requiring a rehearing, the former opinion would seem to be directly in line with the concluding paragraph of the opinion in *Rockport* v. *Webster*.

We see nothing in the offer of proof to affect or control the decision heretofore made or to justify the granting of the petition for a rehearing.

Petition for rehearing denied.

WHEELER-STENZEL COMPANY *vs.* AMERICAN WINDOW GLASS COMPANY & trustees.

Suffolk. January 11, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Malicious Interference. Pleading, Civil, Declaration. *Unfair Competition. Sherman Act.*

In a declaration in an action for maliciously inducing another person to break his contract with the plaintiff, it is not necessary to set out the statements, if any, which were made by the defendant to induce the third person to break the contract.

In the declaration in an action for maliciously inducing another person to break his contract with the plaintiff, it is not necessary to set out the contract between the plaintiff and the third person. It is sufficient to state its effect so far as it is material.

A declaration alleged that the plaintiff was a corporation, organized under the laws of this Commonwealth for the purpose among others of jobbing or retailing window glass, with its principal place of business in Boston, that it had been engaged for many years in jobbing and retailing window glass to customers, principally in Boston and New England, and that it and other window glass jobbers throughout the United States entered into contracts with an association called the National Window Glass Jobbers Association, by which the association agreed to purchase window glass in large quantities from the manufacturers thereof, principally the defendant, and to sell it to the plaintiff and the other jobbers, that the plaintiff under its contract was entitled to receive from the association a large quantity of window glass, namely, two hundred thousand boxes, but that the defendant, with knowledge of the contract between the plaintiff and the association, and with intent to injure the plaintiff in its business, maliciously induced the association to break its contract with the plaintiff and to refuse to deliver to it any of the window glass to which the plaintiff was entitled. The defendant demurred to the declaration, contending

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that the contract between the plaintiff and the association, as described in the declaration, was in unlawful restraint of trade, and was illegal both at common law and under 26 U. S. Sts. at Large, c. 647, commonly known as the Sherman act, and therefore that the interference of the defendant to prevent the performance of the contract was justified as fair trade competition. *Held*, that there was nothing in the contract described in the declaration in violation of the Sherman act, so called, nor anything tending to create a monopoly or to operate in restraint of trade at common law, and that the demurrer should be overruled, the plaintiff having stated a case on which it was entitled to recover damages from the defendant for knowingly and maliciously inducing the association to break its contract with the plaintiff.

MORTON, J. This is an action of tort to recover damages of the defendant for maliciously inducing the National Window Glass Jobbers Association to break a contract which it is alleged to have entered into with the plaintiff, and to refuse to deliver to the plaintiff window glass to which it was entitled under the contract. The declaration is in two counts and there was a demurrer to each count. The causes assigned for demurrer are the same as to both counts except that the demurrer to the second count assigns as an additional cause that that count shows that there was no contract between the plaintiff and the Jobbers Association.

The presiding judge * overruled the demurrers, but, being of opinion that the questions raised so affected the merits of the controversy that the matter ought to be decided by the full court before further proceedings, reported the case to this court.

One of the causes of demurrer common to both counts is that neither count states a legal cause of action substantially in accordance with the rules contained in R. L. c. 173. Other causes of demurrer common to both counts and relating more to matters of form are that neither copies of the contract of the plaintiff with the Jobbers Association nor sufficient parts therof are annexed to the declaration as required by the statute, and that the means by which the defendant induced the Jobbers Association to break the contract are not set out.

Each count alleges that the defendant not only induced the Jobbers Association to break its contract with the plaintiff, but that it maliciously induced the association to do so. Neither count sounds in slander as in *May* v. *Wood*, 172 Mass. 11, which the court has manifested a disinclination to extend further

* *Fessenden*, J.

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(*McGurk* v. *Cronenwett*, 199 Mass. 457, 460), and it was not necessary to set out the statements, if any, that were made by the defendant to the association to induce it to break its contract. It is well settled that it is actionable to maliciously induce another to break his contract with the plaintiff. The gist of the action is maliciously or without justifiable cause inducing another to break his contract with the plaintiff and the means by which it is done are immaterial. *Walker* v. *Cronin*, 107 Mass. 555. *Moran* v. *Dunphy*, 177 Mass. 485. *Beekman* v. *Marsters*, 195 Mass. 205. *McGurk* v. *Cronenwett*, 199 Mass. 457. It is not seriously contended that a contract between the plaintiff and the Jobbers Association is not sufficiently alleged in the second count. See *O'Connor* v. *North Truckee Ditch Co.* 17 Nev. 245. It follows that a legal cause of action was stated in each count. It was not necessary to set out the contract between the plaintiff and the Jobbers Association. The effect of the contract was sufficiently stated so far as material and both counts conformed so far as the several causes of demurrer which we have been considering are concerned to approved precedents. *McGurk* v. *Cronenwett*, *supra*, second count. *Moran* v. *Dunphy*, *supra*, second count. *Walker* v. *Cronin*, *supra*.

The principal question raised by the demurrer and the one on which the defendant chiefly relies is that the contract or arrangement set out in the declaration between the plaintiff and the Jobbers Association is in restraint of trade and therefore illegal both at common law and under the Sherman act so called (26 U. S. Sts. at Large, c. 647, approved July 2, 1890), and that what the defendant did was justifiable as fair trade competition. This requires a scrutiny of each count in order to determine whether the allegations have the scope and effect which the defendant contends that they have.

Passing over the introductory averments, the first count alleges that in furtherance of its business as a window glass jobber the plaintiff in connection with other window glass jobbers throughout the United States entered into contracts in December, 1899, with the National Window Glass Jobbers Association by which the association agreed to purchase window glass in large quantities and distribute the glass so purchased in accordance with the contracts to the plaintiff and the other contracting

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parties; that pursuant to such contracts the association purchased large quantities of window glass from the manufacturers thereof, principally the defendant, and that under its contract with the association the plaintiff was entitled to receive from the association a large quantity of the window glass so purchased, namely not less than two hundred thousand boxes, but that the defendant with knowledge of the contract between the plaintiff and the association and intending to injure the plaintiff in its business maliciously induced the association to break its contract with the plaintiff and to refuse to distribute to the plaintiff any of the glass purchased as aforesaid, and because of such action on the part of the defendant the Jobbers Association has refused and still refuses to distribute to the plaintiff its proportion of the glass so purchased to the great damage, etc.

The introductory averments of the second count are the same as those of the first count, and the plaintiff then proceeds to allege in the second count that, in furtherance of its business as a window glass jobber, it subscribed in December, 1899, in the name of its treasurer for fifteen shares of the capital stock of the National Window Glass Jobbers Association of the par value of $100 each and paid the treasurer of that association in full for such subscription and also paid such dues and assessments as were levied upon and became payable in respect of the stock; that one of the objects of the association was to purchase window glass in large quantities of the manufacturers thereof and distribute the glass so purchased to its stockholders in certain proportions named in certain resolutions of said association; that, between the purchase of and payment for the shares aforesaid by the plaintiff and the date of the writ, the association purchased large quantities of window glass of the manufacturers thereof, principally of the defendant, and that the plaintiff became entitled under the resolutions and regulations of the association by reason of being a stockholder to a large quantity of window glass, to wit, two hundred thousand boxes from the association, and that the association recognized its obligation to distribute to the plaintiff such proportion of the window glass so purchased by it, but that the defendant with knowledge of such obligation on the part of the association and with intent

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to injure the plaintiff in its business maliciously induced the association to violate its obligation to the plaintiff by refusing to distribute to the plaintiff any of the window glass purchased as aforesaid.

The only substantial difference between the two counts is that in the first count the contract is alleged to have been directly between the plaintiff and the Jobbers Association, and in the second count the contract is alleged to have arisen out of the relation of the plaintiff to the Jobbers Association as a stockholder in the association. We do not, however, regard the difference as material.

The sum and substance of both counts is that the plaintiff is a corporation duly incorporated under the laws of this Commonwealth for the purpose amongst others of jobbing and retailing window glass, with its principal place of business in Boston; that it has been engaged for many years in jobbing and retailing window glass to customers principally in Boston and New England, and that in connection with other window glass jobbers throughout the United States it entered into contracts with the National Window Glass Jobbers Association by which the association agreed to purchase large quantities of window glass and distribute the same amongst the contracting parties; that said association did purchase window glass in large quantities from the manufacturers thereof, principally the defendant, and that under its contract the plaintiff was entitled to receive from the association a large quantity of window glass, namely, two hundred thousand boxes; but that the defendant with knowledge of the contract between the plaintiff and the association and with the intent to injure the plaintiff in its business maliciously induced the association to break its contract with the plaintiff and to refuse to deliver to it any of the window glass to which the plaintiff was entitled.

We are unable to discover in the cause of action thus set out anything repugnant to or in violation of the Sherman act, so called, or anything tending to create a monopoly or to operate in restraint of trade at common law. It is perhaps a fair inference that the National Window Glass Jobbers Association is formed, as its name implies, of jobbers in window glass throughout the United States. But it does not appear, if material, what

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proportion of the window glass jobbers in the United States is included in the association. It may be a large proportion or it may be a small proportion. But whether large or small there can be no doubt, we think, that those included in the association had a right to combine and appoint a common agent, which, according to the allegations of the declaration, was in effect what was done, to make purchases of window glass for them, and to distribute the window glass so purchased amongst them according to contracts severally entered into by them with such agent. They had the right to enter into such an arrangement even though one of the objects of it was to avoid competing with each other in the market for window glass. It is not every combination that is unlawful or in restraint of trade under the Sherman act, but only such as tend directly to interfere with and to create a monopoly in or to restrain interstate commerce. *United States* v. *Knight Co.* 156 U. S. 1. *Hopkins* v. *United States*, 171 U. S. 578. *Anderson* v. *United States*, 171 U. S. 604. We are, of course, confined to the allegations contained in the declaration, and there is nothing in either count to show that a monopoly or restraint of interstate commerce was intended or created by the arrangement which was entered into. For aught that appears any jobber in window glass could become a member of the association and contract with it. There is no limit as to the prices to be paid by the association, or the quantities to be purchased or the manufacturers from whom the purchases shall be made. The members of the association are not obliged to purchase from or through it, but may, so far as appears, purchase elsewhere without any restriction as to price or quantity, and may sell anywhere and to any one and on such terms as they see fit. If a jobber in any given locality undertakes to create a monopoly, there is nothing to prevent other jobbers from underselling him if they are able and are disposed to do so. Any advantage which one jobber may have over others by reason of his situation and which may enable him to meet and perhaps defy competition, is an advantage to which he is entitled, notwithstanding he is or may be enabled by means of the combination to purchase glass cheaper than he would otherwise be able to purchase it and thereby to assure his lead over his competitors. It is not alleged either expressly or by

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necessary implication that the object of the association is to restrain or monopolize interstate commerce. If the association has any such effect, it is too indirect and remote to be the subject of consideration. But by enabling those contracting with it to buy window glass on more advantageous terms, it would seem that the arrangement tended rather to encourage than to restrain or monopolize interstate trade and commerce. The free flow of commerce between the States is not interfered with, directly at least, in any manner, and it is plain, we think, that neither at common law nor under the Sherman act was or is there anything unlawful in the contracts relied on or in the circumstances under which they were entered into. See *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353. Whether in view of the facts alleged in the case of *Wheeler-Stenzel Co.* v. *National Window Glass Jobbers' Association*, 152 Fed. Rep. 864, where the demurrer was sustained, the plaintiff can finally prevail is not a matter for us to consider. In *Edwards* v. *National Window Glass Jobbers Association*, 68 Atl. Rep. 800, the validity of the contract does not appear to have been questioned.

It is manifest that to knowingly and maliciously induce another to break a contract with the plaintiff is not justified by fair trade competition.

Demurrer overruled.

R. M. Morse & C. B. Southard, (*T. Parker* with them,) for the defendant.

H. E. Bolles & B. E. Eames, for the plaintiff.

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FRANK W. HERRICK, trustee, *vs.* NEW YORK LIFE INSURANCE COMPANY.

Suffolk. January 21, 22, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, & LORING, JJ.

Contract, Performance and breach. *Insurance*, Agent's commission. *Agency.*

A master, to whom was referred a suit in equity by the trustee in bankruptcy of an insurance agent against an insurance company to recover the amount alleged to be due to the agent under a contract in writing between the agent and the company as a percentage of renewal premiums paid to the defendant on policies procured by the agent before his adjudication as a bankrupt, which was in March of a certain year, found that one of the provisions of the contract between the agent and the defendant was that, if the agent, "during the maturity of renewals provided in this agreement shall engage in the life insurance business for any other company" in a certain territory, "all renewals which would otherwise accrue thereafter shall be forfeited to the" company, and that, after October 17 of the same year as that in which the agent was adjudicated a bankrupt, "the agent placed no insurance with the defendant company, but did place insurance with other insurance companies without the defendant's consent." He made no finding that any renewal premiums were paid to the defendant between March and October. The bill was dismissed and the plaintiff appealed. *Held*, that the bill rightly was dismissed, since it did not appear that anything was due to the agent, whose trustee the plaintiff was, before October 17, and it did appear that after that date nothing was due because the agent engaged "in the life insurance business for" another company.

BILL IN EQUITY, originally an action at law, filed in the Superior Court on April 7, 1904, for a percentage of renewal premiums on life insurance policies alleged to be due as commissions to Isador Wolffsohn, whose trustee in bankruptcy the plaintiff was, as stated in the opinion.

The case was referred to John F. Brown, Esquire, as a master. Besides the findings stated in the opinion, he found that on March 27, 1899, the bankrupt owed the defendant $678.82. Other material findings are stated in the opinion. Exceptions of both parties to the report were overruled by *Fox*, J., who made a decree dismissing the bill. The plaintiff appealed.

R. S. Warner, for the plaintiff.

W. A. Morse, (*F. J. Geogan* with him,) for the defendant.

LORING, J. This is a bill brought by the trustee in bankruptcy of an insurance agent to recover commissions due on

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renewal premiums paid after the agent was adjudicated a bankrupt, on policies placed by the agent before the date of the adjudication.

The agent was adjudicated a bankrupt on March 27, 1899; he received his discharge in bankruptcy on April 30, 1900, and was formally reinstated as an agent of the defendant on May 3, 1900. The master found that during the period between March 27, 1899, and April 30, 1900, it was understood between him and the defendant company that he was to continue to work as before in spite of a letter dated September 9, 1899, written by the defendant company terminating his agency for cause. This letter was found by the master to have been written at the agent's suggestion with a view to help him in his bankruptcy proceeding, and that it was not intended to cancel the contract between him and the defendant company.

The original contract between the agent and the defendant company contains this provision: "It is agreed that if said party of the second part, during the maturity of renewals provided in this agreement, shall engage in the life insurance business for any other company in the territory herein provided, all renewals which would otherwise accrue thereafter shall be forfeited to said party of the first part, provided, however, said party of the second part may engage in the life insurance business in the service of some other company in said territory if the agency created by this agreement shall be terminated by said party of the first part without cause."

The master found that after October 17, 1899, the agent placed no insurance with the defendant company, but did place insurance with other insurance companies without the defendant's consent, and that on August 15, 1900, the defendant company rightfully discharged the bankrupt for cause. It follows that the commissions on the renewal premiums paid after October 17, 1899, were forfeited. See in this connection *Chase* v. *New York Ins. Co.* 188 Mass. 271.

It does not appear that any renewal premiums were paid between March 27, 1899, and October 17, 1899, and it does not become necessary to consider the interesting questions which would have arisen had it appeared that renewal premiums were paid during that period.

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The plaintiff has not argued the several exceptions taken by him. We find no error in the decree of the Superior Court overruling them. We ought to add that there is nothing in the record showing what the cause was for which the master found that the bankrupt was rightfully discharged by the defendant on August 15, 1900.

The entry must be *Bill dismissed with costs.*

CHARLES M. MURPHY *vs.* JOHN W. RUSSELL & others.

Hampden. January 27, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Practice, Civil, Ordering verdict, Demurrer, Parties, Declaration, Amendment.

The objection that the facts alleged in a declaration do not entitle the plaintiff to judgment can be raised by asking that a verdict be ordered for the defendant at the close of the evidence at the trial, as well as by demurrer.

At the trial of an action of tort for personal injuries received by the plaintiff from falling down an elevator well, where there are three defendants and one count of the declaration alleges that one of the defendants owned the building where the accident occurred and was negligent in failing to guard the elevator shaft and to keep it in repair, and other counts allege that the plaintiff was in the employ of the other two defendants, who were liable to him at common law and under R. L. c. 106, § 71, cl. 1, 2, as such employers, but no count sets forth a joint tort of all three defendants, it is proper for the presiding judge at the close of the evidence to order a verdict for the defendants and to refuse to allow the plaintiff to amend his declaration by adding a count alleging a further common law liability of two of the defendants as the plaintiff's employers.

TORT, for personal injuries received by the plaintiff while in the employ of two of the defendants, Merrill and Emerson, from falling down an elevator shaft in a building owned by Russell, the other defendant. Writ dated January 16, 1907.

The case was tried before *Hitchcock*, J. A verdict was ordered for the defendants under the circumstances stated in the opinion; and the plaintiff alleged exceptions.

The case was submitted on briefs.

D. E. Leary, E. W. Beattie, Jr., & G. D. Cummings, for the plaintiff.

J. G. Dunning, for the defendant Russell.

C. T. Callahan, for the defendants Merrill and Emerson.

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LORING, J. At the close of the evidence in this case the defendant Russell and the defendants Merrill and Emerson asked the judge to rule that on the pleadings and the evidence the plaintiff was not entitled to recover. The judge granted the request and ordered a verdict for the defendants.

The defendants were sued jointly. Russell was the owner of the building and Merrill and Emerson were tenants of the fifth floor, with a right to use the elevator in common with other tenants.

It is not necessary to consider whether the evidence warranted a finding that the accident to the plaintiff was caused by concurring negligence of both sets of defendants, for which a joint action could be maintained under the rule acted upon in *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575, where the earlier cases are collected. Upon that point we express no opinion.

There was no count in the declaration which alleged a joint tort of that or of any other kind. In the first count the plaintiff alleged that the defendant Russell as the owner of the building owed the plaintiff the duty of protecting the elevator shaft with gates and of keeping them in repair, and that the injury was caused by neglect of that duty. In the second, third and fourth counts he sought to hold the defendants Merrill and Emerson liable on the ground that he was in their employ, and that they were negligent in the duty owed by them as employers to him as an employee at common law so far as the second and third counts are concerned, and under the employer's liability act so far as the fourth count went.

The objection that the facts alleged in the declaration do not entitle the plaintiff to judgment can be raised by asking that a verdict be ordered for the defendant as well as by demurrer. *Hervey* v. *Moseley*, 7 Gray, 479. *Hubbard* v. *Mosely*, 11 Gray, 170. *Nowlan* v. *Cain*, 3 Allen, 261, 263. *Oliver* v. *Colonial Gold Co.* 11 Allen, 283. *Oulighan* v. *Butler*, 189 Mass. 287, 289. See also *Tracey* v. *Grant*, 137 Mass. 181. This practice presumably grows out of the rule introduced in the practice acts of 1851 and 1852 (now R. L. c. 173, § 118), that judgment shall not be arrested for a cause existing before verdict unless the cause affects the jurisdiction of the court.

The count which the plaintiffs sought to add by way of

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amendment was a count of the same kind as the second and third. If the judge had allowed it the plaintiff would have been no better off. For that reason it was a wise exercise of discretion on his part to deny it.

Exceptions overruled.

TAYLOR F. SMITH & another *vs.* BAY STATE SAVINGS BANK.

Suffolk. January 28, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Fixtures. Real Property. Personal Property. Mortgage, Of realty, Of personal property.

Whether an article annexed to a building by the owner of the building continues to be a chattel or becomes part of the realty so as to pass under a deed or a mortgage of it depends upon what was the intention of the owner when he annexed it as manifested by his acts.

At the trial of an action for the alleged conversion of a set of three bars used in the bar room of a hotel, it appeared that the owner of a parcel of real estate erected thereon a building to be used as a hotel and purchased the set of bars by a conditional sale, the title to them not to become his until the price was fully paid, and placed them in a room which he thereupon fitted up as a bar room. Shortly after the bars were so placed, he executed a mortgage of the realty to the defendant, which contained the usual description of real estate and no mention of the bars specifically. He thereupon used the room as a bar room and about six months later made the payment of the purchase price of them, and four months later still executed a mortgage of personal property to the plaintiff, specifically mentioning and including the bars. There was evidence tending to show that the back bar was in two parts, an upper and a lower, and that neither part was fastened to the realty, that the front bar was fastened by angle irons and wooden cleats screwed to the floor, that the working bar was attached to the front bar, and had various pipes which were fastened to water and drain pipes in the building and were detachable, that the bars were of the regular stock pattern, and could be removed easily through the doors of the building. The defendant foreclosed its mortgage on the realty and, the plaintiff subsequently foreclosing his, refused to give the plaintiff possession of the bars. *Held*, that whether the bars had become a part of the realty and therefore passed under the mortgage to the defendant depended upon what was the intention of the owner as manifested by his acts, which question was for the jury to determine.

TORT for the alleged conversion of three bars used in the bar room of a hotel. Writ dated December 17, 1904.

The case was tried before *Sherman*, J. Besides the facts stated in the opinion, it appeared from the report by the presiding judge

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that it was "admitted for the purposes of this report that there had been a breach of the condition in the plaintiffs' mortgage, and that the plaintiffs had a right to possession of the articles in question if they were not real estate or held under defendant's mortgage, entry, or foreclosure. That is, it was agreed between counsel at the trial, that, if these articles were personal property, the plaintiffs had a right to them unless held under defendant's mortgage, entry, or foreclosure; but if they had become a part of the realty or held as aforesaid, the plaintiffs did not have a right to them; and this was the question at issue in this case." Other facts are stated in the opinion.

The presiding judge ordered a verdict for the defendant and reported the case for determination by this court under the terms stated in the opinion.

The case was submitted on briefs.

H. I. Cummings, for the plaintiffs.

J. B. Ratigan, *C. J. O'Hara & J. E. Swift*, for the defendant.

LORING, J. This is an action of tort for the conversion of an oak bar, a working bar and a back bar. The following facts were not in dispute.

During the year 1899 one Pellett owned a lot of land in Southbridge and began the erection on it of a brick building three stories in height, to be used as a hotel. On March 20, 1900, Pellett bought of one Spalt, "a maker of such articles," the three bars here in question, and also an ice box and "some other property," for $1,325. The sale was an entire one and was conditioned on the whole purchase price being paid. Pellett paid $445 in cash and gave two notes for $440 each, payable in June and September. These were paid at maturity. All the articles so purchased were placed in the bar room before April 26, 1900. On April 26, 1900, Pellett executed a power of sale mortgage on the real estate to the defendant to secure money borrowed of it. This mortgage "was in the usual form and did not specifically mention the articles in question." "At the date of the defendant's mortgage, the bar room, the office, and a small room that was attached to the bar room was practically finished, but the rest of the building was not. After the articles in question had been put in the bar room there was practically no further work done in that room."

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On May 7, 1901, the plaintiffs lent Pellett $1,629.15 on a mortgage of personal property, including the three bars here in question. There was a breach of this mortgage, and the plaintiffs were entitled to them unless they had become part of the realty and passed under the mortgage to the defendant.

Pellett used the room in which the three bars here in question were put as a bar room, from the time they were put in (in March or April, 1900) until May 1, 1902, when his license expired.

The defendant's mortgage was foreclosed on June 16, 1902.

On May 17, 1904, the defendant notified Pellett to remove his personal property. On June 7, 1904, the plaintiffs went to the premises to take out the articles covered by their mortgage. The defendant forbade the removal of the three bars. This action was brought on December 17, 1904, based on that as a conversion of them.

At the close of all the evidence the defendant's counsel requested the judge presiding at the trial to instruct the jury to return a verdict for the defendant on the ground "that there was no evidence which entitled the plaintiffs to go to the jury," and on the ground "that the articles in question had become so affixed to the freehold as to become a part of it, and there never having been any severance either by Pellett or anybody acting for him, within a reasonable time after he left it, there could be no action for conversion." The judge ruled that "independent of the question of severance," which he did not decide, "on all the evidence the plaintiffs were not entitled to go to the jury." The parties having agreed that, if the plaintiffs were so entitled, the Supreme Judicial Court should order judgment entered for the plaintiffs in the sum of $700, the judge directed the jury to return a verdict for the defendant under this agreement, to which ruling and direction the plaintiffs excepted. The jury returned a verdict for the defendant and, both parties agreeing thereto, the case was reported to this court; if on the report of the facts and evidence the rulings were right, "then judgment is to be entered on the verdict; otherwise judgment is to be entered for the plaintiffs in the sum of $700; or such other disposition may be made of the case as the Supreme Judicial Court shall order."

1. The defendant has contended that an action of trover does not lie for these bars which are in fact affixed to the freehold

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although there is a right to sever them; and cites in support of that position *Guthrie* v. *Jones*, 108 Mass. 191; *Raddin* v. *Arnold*, 116 Mass. 270; *Brown* v. *Wallis*, 115 Mass. 156. Those were cases where a tenant had annexed to the freehold a trade fixture during the term of his lease. It was held in *Carpenter* v. *Walker*, 140 Mass. 416, affirming previous cases there cited, that in this Commonwealth articles annexed to the freehold by the owner which do not pass under a deed or mortgage as part thereof continue to be chattels. It is hard to see why an action of tort for their conversion does not lie if that be so, even if it be now true that conversion does not lie for tenants' trade fixtures so long as they are not severed. But we do not find it necessary to pass upon this because by the terms of the report we are of opinion that the ruling made by the presiding judge was not made as a ruling on the pleadings.

2. We are of opinion that it could not be ruled as matter of law that the three bars had become part of the freehold.

Where the question is whether an article annexed to a building by the owner continues to be a chattel or becomes part of the real estate so as to pass under a deed or a mortgage of it, the point to be ascertained is the intention of the owner. Was it his intention, in annexing the article to the real estate, permanently to increase the value of it even if the article can be removed without serious injury to the building or to the article, or was it his intention to annex it as a piece of furniture though more or less substantially fastened to the building? See *Hook* v. *Bolton*, 199 Mass. 244, where the earlier cases are collected. The intention of the owner on which this question depends is not his secret, undisclosed intention, but his intention as manifested by his acts. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519.

The question whether a chattel annexed by the owner continues to be a chattel is not the same as it is when the chattel is annexed by a tenant during the term of his lease. Many articles annexed by a tenant can be removed by him which, if annexed by the owner, become part of the realty and pass under a deed or mortgage. *Richardson* v. *Copeland*, 6 Gray, 536, 538. *McConnell* v. *Blood*, 123 Mass. 47. For that reason *Kimball* v. *Grand Lodge of Masons*, 131 Mass. 59, *Hanrahan* v. *O'Reilly*, 102 Mass. 201,

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Park v. *Baker*, 7 Allen, 78, and *Cottrell & Sons Co.* v. *Carter, Rice & Co.* 173 Mass. 155, cited by the plaintiffs, are not in point.

There was not only a direct conflict between the evidence of the plaintiffs and that of the defendant as to how the bars were affixed to the building, and what the effect of removing them would be, but the evidence introduced by the plaintiffs was conflicting on many of the points on which that question depends.

The jury were warranted in making the following findings:

The back bar was about twenty-four feet long and eleven to twelve feet high. The lower part was used for storing goods. The upper part, which had a mirror in it and was for display, rested on the lower part. Although there was much evidence to the contrary given by witnesses put on the stand by the defendant, the jury were warranted in finding that it was not attached at all to the floor on which it stood nor to the wall which it covered.

The front bar was about twenty-six or twenty-seven feet long, and curved back for about two and a half feet at the ends. It was held in position by angle irons and wooden cleats screwed, not nailed, to the floor.

The working bar was attached to the front bar and was made of copper, brass and tin. It contained an ice box, wash basins, sink and drainer. The drainer and washing arrangements had pipes leading to barrels in the cellar, but the pipes were not attached to the building. The drainer could be taken off the bar by unscrewing the pipes, "and . . . the same would be true for separating all faucets and connections with the bar; namely, by unscrewing pipes." Pellett, called by the plaintiffs, testified on cross-examination that "there were quite a number of pipes running down from the front bar through the floor into the cellar, perhaps a dozen or fifteen; that one of them was a water pipe connecting with the town water, which was fastened on with a clamp, inside the bar; there was a drainage pipe running from the working bar right through the floor and fastened to the drainer and clamped on to the wall like any water pipe anywhere, but [they were] not soldered to the floor in any way; that none of the pipes were soldered to the floor, but were soldered to the couplings that went on to the drainer; that the dozen or fifteen pipes were all run from the drainer underneath the front bar."

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"The bar," and as we understand it, the three bars, "as you would take it out would easily go through the doors that were there."

The room seems to have been finished with a wooden sheathing, and a rail about the height of the witness stand; and above that "a metal sheathing," but the metal sheathing did not cover all the wall which was behind and covered by the back bar and was covered by it. It would seem that this sheathing was put on after the bar was set up, in spite of the statement in the undisputed facts that after the bars were put in practically no further work was done in the bar room.

There was evidence that the wall behind the refrigerator, which was one of the articles bought for $1,325 with the bars, was left unfinished as was the wall behind the back bar. This refrigerator had pipes running through the floor and was conceded to be the property of the plaintiffs and was taken away by them without objection.

The bar was an ordinary bar bought from a maker, that is to say, it could be found to be an article of regular stock pattern. That is of some importance. See *Wentworth* v. *Woods Machine Co.* 163 Mass. 28, 33. In that connection it is of importance that the bars could be carried out through the doors without their being enlarged.

If Pellett had given a mortgage back to secure the purchase price of the bars when he bought them, that would have been an act bearing on his intention. *Wentworth* v. *Woods Machine Co.* 163 Mass. 28, 33. The fact that the bars and the refrigerator and "some other property" not annexed to the building were bought on conditional sale for an entire price, in like manner has some bearing on the intention of the owner in annexing them to the building.

The fact that the working bar was connected with the town water is not conclusive. The same was true of the "twenty-four kitchen stoves put into twenty-four kitchens of twenty-four apartments in a tenement house by the owner of it," and yet it was held that it was a question for the jury whether they had or had not become part of the realty. *Jennings* v. *Vahey*, 183 Mass. 47. For like decisions see *Turner* v. *Wentworth*, 119 Mass. 459; *Hook* v. *Bolton*, 199 Mass. 244.

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Whether machines weighing from three thousand to four thousand five hundred pounds, put in by the owner and screwed to the floor, are or are not chattels is for the jury. *Wentworth* v. *Woods Machine Co.* 163 Mass. 28. For similar cases see *Carpenter* v. *Walker*, 140 Mass. 416; *Maguire* v. *Park*, 140 Mass. 21; *Hubbell* v. *East Cambridge Five Cents Savings Bank*, 132 Mass. 447; *Southbridge Savings Bank* v. *Mason*, 147 Mass. 500. So as to a portable engine and boiler cast as one machine weighing five thousand six hundred pounds, which could be removed only by taking off the roof of the shed in which they were. *Carpenter* v. *Walker*, 140 Mass. 416.

The fact that the jury could have found that the back bar was in no way attached to the floor or to the wall was of itself enough to prevent the judge directing the jury to return a verdict for the defendant for all three bars.

But apart from that we have been referred to no case in Massachusetts which has gone so far as the rulings went in the case at bar. *Hopewell Mills* v. *Taunton Savings Bank*, 150 Mass. 519, went off on the ground that no inferences of fact can be drawn where a case is submitted on agreed facts, and that on the agreed facts it did not appear that the articles there in question were personal property as matter of law. *McConnell* v. *Blood*, 123 Mass. 47, so far as the engine and boiler were concerned, seems to have been decided on the same ground. The machines in *Smith Paper Co.* v. *Servin*, 130 Mass. 511, were specially adapted to the factory in question, and were not like regular stock machines. There is a case in Minnesota which sustains the ruling made in this case in the Superior Court, namely, *Woodman* v. *First National Bank*, 48 Minn. 67. The general rule in Minnesota is there stated to be "that all annexations to the realty pass by the deed or mortgage unless excepted in express terms from the conveyance." The rule in Massachusetts is not so broad as that. Finally, as was said by this court in *Carpenter* v. *Walker*, 140 Mass. 416, 420: "It is more important to respect decisions upon a question of property than to preserve a simple test."

Under the circumstances we think that the case should go back for a new trial.

So ordered.

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WALTER B. SMITH *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 2, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, In use of highway. *Street Railway.*

If, in order to reach a stairway leading to an elevated railway station by way of a platform which is between parallel tracks on the surface of a street, a traveller on the highway, instead of continuing to cross to the platform on a crosswalk on which he is walking, leaves the crosswalk when he still is ten feet from the nearest street car rail and goes diagonally toward the platform for some distance and then along beside the rail for four or five steps with his back to a car which he has seen about two hundred feet away when he left the crosswalk but which he has not looked at again after leaving the crosswalk, and is struck by the car just as he steps upon the track, he cannot be said to be in the exercise of due care, although at the time when he left the crosswalk he "assumed . . . that he had time to cross the track and get on to the platform before the car came along."

TORT for injuries received from being run into from behind by a street railway car of the defendant. Writ in the Municipal Court of the city of Boston dated July 18, 1907.

The case was tried before *Crosby*, J., who, at the close of the evidence, ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. J. Shaughnessy, (*F. P. O'Donnell* with him,) for the plaintiff.

W. H. Foster, (*H. S. MacPherson* with him,) for the defendant.

LORING, J. On his own story, the plaintiff started from the westerly sidewalk of Washington Street to cross that street on a crosswalk just south of Massachusetts Avenue. Two surface tracks of the defendant railway run in the centre of that street with a platform between them, leading to the entrance to an overhead station of the defendant company's elevated railway. The plaintiff was on his way to this station. After walking on the crosswalk to a point ten feet short of the westerly rail of the westerly track, he left the crosswalk and proceeded first in a diagonal direction toward the westerly rail, and then along beside the westerly rail four or five steps, and was just in the

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act of putting his left foot over that rail when he was run down from behind by one of the defendant's cars. He was then thirty feet from the crosswalk and an equal distance from the northerly end of the platform. He saw the car in question some one hundred and fifty to two hundred feet below the crosswalk, just before he left the crosswalk, and did not look again before he was struck. He further testified that "he assumed at the time he saw the car that he had time to cross the track and get on to the platform before the car came along."

This evidence did not warrant a finding that the plaintiff was not guilty of contributory negligence. *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533. *Itzkowitz* v. *Boston Elevated Railway*, 186 Mass. 142. *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8. *Holian* v. *Boston Elevated Railway*, 194 Mass. 74. *Madden* v. *Boston Elevated Railway*, 194 Mass. 491. *Casey* v. *Boston Elevated Railway*, 197 Mass. 440.

The plaintiff relies on *Murphy* v. *Armstrong Transfer Co.* 167 Mass. 199; *Hennessy* v. *Taylor*, 189 Mass. 583; and *Bowser* v. *Wellington*, 126 Mass. 39. But in all those cases the plaintiff was walking directly across the street on the crosswalk. Here the plaintiff left the crosswalk and proceeded for thirty feet with his back to the oncoming car. In *McCrohan* v. *Davison*, 187 Mass. 466, also, the plaintiff was walking directly across the street on the crosswalk and was run down when within a foot of the sidewalk which he was seeking to reach. In such a case the fact that he saw the vehicle which struck him and thought that he had time to cross the street was evidence of due care, while it is not in the case at bar. In the case at bar, in place of crossing the track on the crosswalk and walking to the platform between the two tracks, as he could have done, he turned his back on the approaching car and walked forward thirty feet and then started to cross the track without again looking to see if he could do so in safety.

Exceptions overruled.

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MARY E. McNAMARA, administratrix, *vs.* BOSTON AND MAINE RAILROAD.

SAME *vs.* SAME.

SAME *vs.* CENTRAL VERMONT RAILWAY COMPANY.

SAME *vs.* SAME.

Middlesex. March 3, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Railroad, Defective car of company other than defendant, Gross, Causing death, *Res ipsa loquitur*. *Evidence*, Presumptions and burden of proof. *Estoppel*.

Where one railroad company has the possession and control of and is using in its own business and for its own purposes as a part of one of its trains a freight car owned by another company, its duty to strangers is not discharged merely by establishing an adequate system of inspection and by providing a sufficient number of competent inspectors, but it is under the same liability as if it were itself the owner of the car.

It is the ordinary experience of mankind that the top roof of a railroad car will not blow off even in a high wind if the car is in good condition and in a proper state of repair and, if the roof of such a car does blow off in a high wind while the car is in the possession and control of and is being used by a railroad company, which is not its owner, for its own purposes and as a part of one of its own trains, and a person, not a passenger, rightly in the neighborhood is injured thereby, it well may be inferred in the absence of explanation that the accident was due to the negligence of such railroad company.

The mere fact that, at the trial of an action of tort for personal injuries alleged to have been caused by reason of negligence of the defendant, both the plaintiff and the defendant offer evidence in attempted explanation of the accident, does not preclude the jury, in case they find that no satisfactory explanation has been given, from finding negligence of the defendant from the mere happening of the accident if it was one which was caused by instrumentalities in the control of the defendant at the time and which in the ordinary experience of mankind would not have happened if such instrumentalities had been in good condition and in a proper state of repair.

At the trial of an action under R. L. c. 171, § 2, against a railroad company by the administrator of one who, while in the exercise of due care, was killed by being struck by the roof blown from a freight car in a high wind, it appeared that the car was owned by a railroad company other than the defendant and that at the time of the accident it was in the possession and control of the defendant and was being used by it on its own business and as a part of one of its own trains; and there was evidence tending to show that a fascia board was broken off from the roof and that the roof was in such condition that wind could get between it and a metallic roof immediately beneath it, that such a condition was a generally

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recognized source of danger, that the roof which blew off had been loose fifteen minutes before the accident and in such a condition as to call for an examination while the car was being shunted about, that an examination of the roof was made by employees of the defendant, who found no defect therein, that the wind at the time was blowing fifty miles an hour, and that a proper examination of the car and its roof would have disclosed the imminent danger, with the existing wind, of just such an occurrence as did take place. *Held*, that there was evidence, not only of want of ordinary care on the part of the employees of the defendant who inspected the car and permitted it to continue unrepaired, but also of gross negligence on their part.

The doctrine of *res ipsa loquitur* is to be applied only against a party who by himself or his servants had at the time of the accident in question the control and management of the appliance or instrumentality whose failure or defective condition was the cause of the accident.

Where a railroad company delivers a freight car of which it is the owner to another railroad company which is to deliver the car to a third company in the course of transporting freight, and, after the car has completed its journey, it again comes into the possession of the second company, which without authority from the owner uses it in its own business and as a part of one of its own trains, the company which owns the car is not liable, either solely or jointly with the company in whose possession the car is, to a stranger who is injured by reason of a defect or want of repair therein, whether such defect or want of repair is hidden or obvious.

FOUR ACTIONS OF TORT to recover for personal injuries to and the death of the plaintiff's intestate caused by the roof of a freight car blowing upon him as stated in the opinion. Writs dated June 28, 1907.

The cases were tried together before *Lawton*, J. At the close of the plaintiff's evidence, the defendant Central Vermont Railway Company rested in the two cases in which it was defendant, the presiding judge ordered verdicts in its favor; and the plaintiff alleged exceptions.

At the close of all the evidence, the defendant Boston and Maine Railroad asked the presiding judge to rule in the two cases in which it was defendant as follows:

"1. There is not sufficient evidence to warrant a verdict for the plaintiff [in either case]. . . .

"3. There is not sufficient evidence to warrant a finding of gross negligence of the defendant's agents or servants. . . .

"6. If the jury find that the roof blew off because it was not securely fastened to the car and that the condition of the roof in this respect could not have been discovered by inspection, the defendant is not liable [in either case]. . . .

"9. If the jury find that at the time of the inspection of the

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car any portion of the fascia board was missing and that there was a faulty construction of the roof which could not have been discovered by inspection and that the blowing off of the roof was caused by the combination of the missing portion of the fascia board and the faulty construction, the plaintiff cannot recover [in either case].

"10. Under the circumstances stated in the last request, the defendant's inspectors would not have notice that the loss of the fascia board would make it possible that the roof could be blown off and they would not be grossly negligent in allowing the car to proceed without being repaired."

The presiding judge refused so to rule, and in his charge instructed the jury as to the doctrine of *res ipsa loquitur* as stated in the opinion. The jury found for the plaintiff in the first two cases; and the defendant Boston and Maine Railroad excepted.

The case was argued at the bar in March, 1909, before *Knowlton*, C. J., *Hammond*, *Loring*, *Sheldon*, & *Rugg*, JJ., and afterwards was submitted on briefs to all the justices.

F. N. Wier, (*L. T. Trull* with him,) for the Boston and Maine Railroad.

E. R. Thayer, (*H. S. Davis* with him,) for the Central Vermont Railway Company.

A. J. Daly, for the plaintiff.

SHELDON, J. In the first of these cases the plaintiff seeks to hold the defendant for the conscious suffering, and in the second for the death, of Michael McNamara, her intestate. His injuries and consequent death were caused by the fact that the roof of a freight car in a train of the defendant was blown from the car and fell upon him. It was not disputed that he was in the exercise of due care in the performance of his duties as a servant of the New York Central Railroad Company. The car belonged to the Central Vermont Railway Company. It had been delivered by that company to the defendant at White River Junction, Vermont, on April 7, 1907; and the defendant had transported it over its lines to Lowell, and there delivered it to the New York, New Haven, and Hartford Railroad Company. Thereafter, on April 23, the defendant received this car at Boston from the Union Freight Railroad Company; and on the next day, April 24, when this accident happened, the defendant had the car in

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its possession and control and was using it in the defendant's business, transporting the car over one of its lines and as a part of one of its trains. The defendant put in evidence as to its inspection of this car and as to its system of inspection, and other evidence from which the jury might have found that the blowing off of the roof was due to a faulty construction and a defective condition which were not discovered by its inspectors and were not to be discovered by any proper and reasonable inspection. The first two cases were submitted to the jury, which found for the plaintiff, and they now come before us upon the defendant's exceptions. In the third and fourth cases, the defendant rested at the end of the plaintiff's testimony; at its request a verdict was ordered in its favor; and the plaintiff excepted.

1. In the first case the defendant's contention is that the judge should have ruled that there was not sufficient evidence to warrant a verdict for the plaintiff, and that there was error in the judge's statement that the happening of this accident, if unexplained, was some evidence of negligence. The other exceptions in this case are waived.

The fundamental proposition contended for in the able argument of the defendant's counsel is that it was not responsible for any defects in this car which were not to be discovered by ordinary inspection. It claims the benefit of the well recognized rule that as to the cars of other companies which it receives in the regular course of business for transportation over its road, it owes at common law to its own employees no other duty than that of having them inspected by competent and suitable inspectors, acting under a proper system and under proper superintendence, and that it may properly receive from other companies all cars which, upon such inspection, appear to be in a reasonably safe condition. *Bowers* v. *Connecticut River Railroad*, 162 Mass. 312. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, 16. *Mackin* v. *Boston & Albany Railroad*, 135 Mass. 201. *Ballou* v. *Chicago, Milwaukee & St. Paul Railroad*, 54 Wis. 257. *Gutridge* v. *Missouri Pacific Railroad*, 94 Mo. 468. But this contention does not appear to be supported by the evidence. If it may be inferred that the defendant's original reception of this car from its owner was for the purpose of transportation and delivery to

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a connecting line, yet the purpose of this bailment apparently had been completed and the car had been returned to the defendant. There is nothing in the bill of exceptions to indicate that it was for the purpose of completing any transportation initiated by the owner of this car that the car was delivered by the Union Freight Railroad Company to the defendant. The plaintiff's evidence, it is stated in the exceptions, tended to show that the defendant at the time of the accident not only had the car in its possession and control, but was using the car in its own business. The evidence of the defendant that it had inspected the car with the same system that it used both upon its own cars and upon those owned by other railroads had no tendency to control this evidence. We are of opinion that the defendant must be regarded, or at least might have been regarded, as having adopted this car as a part of its own equipment and one of its instrumentalities. But if this is so, its duty to strangers could not be discharged by merely establishing an adequate system of inspection and providing a sufficient number of competent inspectors. It would be subject to the same liability as if it were itself the owner of the car. *Beattie* v. *Boston Elevated Railway*, 201 Mass. 3. *Ladd* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 359, 361, 362, and cases cited.

But even if the defendant could be treated as having merely received this car from a connecting line for further transportation over a continuous route, yet, as the plaintiff was not its servant, it would be responsible to him for any negligence of its inspectors. This is the doctrine of *Littlejohn* v. *Fitchburg Railroad*, 148 Mass. 478. But there was evidence here that proper inspection would have discovered the loose and dangerous condition of this roof; and although the defendant's evidence contradicted this, the question would be one for the jury, as in *Lutolf* v. *United Electric Light Co.* 184 Mass. 53, 57.

We think it plain that in this case a verdict could not have been ordered for the defendant, but that the question of liability was for the jury.

Nor can it be affirmed that there was error in what was said by the judge at the trial as to the happening of an accident like this, if unexplained, furnishing some evidence of negligence. It is the ordinary experience of mankind that the top roof of a

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railroad car will not blow off, even in a high wind, if it is in good condition and in a proper state of repair. But the general rule is that the mere happening of an accident, if it is one that commonly would not happen where due care was used, is some evidence of negligence, on the ground that the accident would not otherwise have happened. *James* v. *Boston Elevated Railway*, 201 Mass. 263. *Beattie* v. *Boston Elevated Railway*, 201 Mass. 3. *Minihan* v. *Boston Elevated Railway*, 197 Mass. 367. *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295. *Savage* v. *Marlborough Street Railway*, 186 Mass. 203. *Graham* v. *Badger*, 164 Mass. 42. And where, in addition to this, the instrumentality which causes the accident is shown to have been at the time under the control and management of the defendant, it well may be inferred, in the absence of explanation, that the accident was due to his negligence. *Magee* v. *New York, New Haven, & Hartford Railroad*, 195 Mass. 111. *Scott* v. *London Dock Co.* 3 H. & C. 596.

The fact that this car was the property of another company does not prevent the application of the rule stated. It was in the possession and under the control of the defendant, and used by the defendant for its own purposes. *Beattie* v. *Boston Elevated Railway*, 201 Mass. 3. *Ladd* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 359. *Hale* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 84. *Foster* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 21. *Spaulding* v. *Flynt Granite Co.* 159 Mass. 587. Although it was agreed that this was a foreign car, yet it was contended that the defendant was liable for it as for one of its own. It is not too much to say that *prima facie* there was a duty upon the defendant to see that the roofs of cars in its own trains should not blow off to the injury of people rightly in the neighborhood, like the duty to see to it that their trains did not come apart while in motion. *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, 19. But this matter already has been sufficiently considered.

The fact that both the plaintiff and the defendant introduced evidence to show just what was the cause of the blowing off of this top roof was properly called to the attention of the jury. They were told that if the accident was explained, if they were satisfied as to its cause, then they must take all the facts and

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say whether or not negligence of the defendant was proved. But they rightly were told also that if they found no explanation of the accident, then it stood as unexplained, and furnished some evidence of negligence. The mere fact that either party or both parties had attempted to explain the occurrence and had failed in that attempt would not prevent the application of the doctrine of *res ipsa loquitur*. As was said in *Cassady* v. *Old Colony Street Railway*, 184 Mass. 156, 168, "An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumptions applicable to it." *Sullivan* v. *Rowe*, 194 Mass. 500. There is nothing in *Galligan* v. *Old Colony Street Railway*, 182 Mass. 211, *Parsons* v. *Hecla Iron Works*, 186 Mass. 221, 223, 224, and similar cases, which is at all inconsistent with this well settled doctrine.

2. In the second action, brought to recover for the death of the plaintiff's intestate, it is not necessary to say anything more upon the defendant's exception to what was said by the court as to the happening of the accident, if unexplained, furnishing some evidence of negligence. The most important question is whether there was sufficient evidence to warrant a finding of gross negligence of the defendant's agents or servants, or whether a verdict should have been ordered for the defendant. These questions, and the refusal of the presiding judge to give the defendant's ninth and tenth requests for instructions, are all that now need be considered.

The defendant's counsel have earnestly argued that even on the doctrine of *res ipsa loquitur*, gross negligence could not be inferred from the mere happening of the accident. But no such ruling was made by the judge. He carefully and plainly distinguished gross negligence from ordinary negligence, and allowed the plaintiff to recover upon this ground only if it was found that the defendant's inspectors had not merely failed to use ordinary care in examining this car, but that they had been grossly negligent. The only question as to this part of the case is whether there was evidence upon this issue for the jury. We are of opinion that there was such evidence. The jury could find upon the testimony put in by the plaintiff that this top roof was in such condition that wind could get in between it and the

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metallic roof, and with more force when, as here, the fascia boards were broken off; that this was a generally recognized source of danger to the roof; that the top roof was loose, and in such a condition as to call for examination while the car was being shunted; that when it was examined by the defendant's inspectors, about fifteen minutes before the accident, there was a very high wind, about fifty miles an hour; and that the circumstances were such that a proper examination would have disclosed the imminent danger, with the existing wind, of just such an occurrence as did take place.* The fact that this state of affairs was controverted by the defendant made it none the less a question for the jury. And in view of the danger to life and limb, both to the defendant's own servants and to strangers in such a position as that of the plaintiff's intestate, a majority of the court are of opinion that the jury were warranted in saying that this showed gross negligence on the part of the inspectors. *Mullins* v. *New York, New Haven, & Hartford Railroad*, 201 Mass. 38. *Pearlstein* v. *New York, New Haven, & Hartford Railroad*, 197 Mass. 578. *Spooner* v. *Old Colony Street Railway*, 190 Mass. 132. *Evensen* v. *Lexington & Boston Street Railway*, 187 Mass. 77. *Hartford* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 365, 368.

The judge also left it to the jury to say whether the defendant itself had been guilty of negligence as to its system of inspection; but no specific exception was taken to this, and we need not consider the evidence that bore upon this question.

The defendant's ninth and tenth requests were refused rightly. It was a question of fact whether the loss of the missing part of the fascia board, under the existing conditions of the weather, and in connection with what else ought to have been discovered upon proper inspection, would be likely to involve danger of the blowing off of the top roof of the car; and it was for the jury to say whether the defendant's inspectors were grossly negligent in allowing the car to proceed without having been repaired. Moreover the judge could not be required to rule upon the effect of specific

* There was evidence that the car was inspected by three inspectors in the employ of the defendant, and that they "upon inspection found no defect in the roof or anything connected therewith."

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parts of the evidence thus singled out from the rest. *Dolphin* v. *Plumley*, 175 Mass. 304. *Moseley* v. *Washburn*, 167 Mass. 345, 362.

It follows that the defendant's exceptions in the first two cases must be overruled, and it is

So ordered.

8. In the third and fourth cases, the defendant rested at the end of the plaintiff's case, and the considerable body of evidence afterwards introduced by the Boston and Maine Railroad cannot be considered. Under these circumstances, many of the questions discussed by counsel in their elaborate arguments do not properly arise.

The occurrence of the accident raised no presumption against this defendant because the car was not at the time in its possession or control; and the doctrine of *res ipsa loquitur* is to be applied only against a party who by himself or his servants had at the time the control and management of the appliance or instrumentality whose failure or defective condition was the cause of the accident. *Kendall* v. *Boston*, 118 Mass. 234, 236. *Wolf* v. *American Tract Society*, 164 N. Y. 30. *Schaller* v. *Independent Brewing Association*, 225 Ill. 492. *Johnson* v. *Walsh*, 83 Minn. 74. *Higgs* v. *Maynard*, Harr. & Ruth. 581.

The defendant cannot be held on the ground that the cause of the accident was a secret defect in the car which might have been found to have been known to the defendant, and that the defendant with such knowledge delivered the car to the Boston and Maine Railroad for transportation over its lines. *Louisville, New Albany & Chicago Railroad* v. *Bates*, 146 Ind. 564. *Moon* v. *Northern Pacific Railroad*, 46 Minn. 106. As the plaintiff left the cases against this defendant, the purposes of its delivery to the Boston and Maine Railroad had been completed, and the latter road was using the car for its own purposes and against the rights of this defendant, as in *Sawyer* v. *Minneapolis & St. Louis Railroad*, 88 Minn. 103. The defendant had not authorized the use which was being made of this car, and cases like *Jackman* v. *Arlington Mills*, 137 Mass. 277, and *Dalay* v. *Savage*, 145 Mass. 88, are not applicable. This case therefore does not present the question considered in the cases from Indiana and Minnesota above referred to, as to which there has been considerable variety of decision. See, besides cases already cited, *Glynn*

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v. *Central Railroad*, 175 Mass. 510; *Wright* v. *Delaware & Hudson Canal Co.* 40 Hun, 343; *Fowles* v. *Briggs*, 116 Mich. 425; *Chicago, St. Louis & Pittsburgh Railroad* v. *Fry*, 131 Ind. 319; *Missouri, Kansas & Texas Railway* v. *Merrill*, 65 Kans. 436, overruling *S. C.* 61 Kans. 671; and *Caledonian Railway* v. *Mulholland*, [1898] A. C. 216. Analogous questions were discussed, sometimes with much elaboration, in *Farrell* v. *Manhattan Market Co.* 198 Mass. 271; *Coman* v. *Alles*, 198 Mass. 99, 103; *Lebourdais* v. *Vitrified Wheel Co.* 194 Mass. 341; *Bishop* v. *Weber*, 139 Mass. 411; *Heizer* v. *Kingsland & Douglass Manuf. Co.* 110 Mo. 605, 614; *Earl* v. *Lubbock*, [1905] 1 K. B. 253; *Heaven* v. *Pender*, 11 Q. B. D. 503; *Collis* v. *Selden*, L. R. 3 C. P. 495, and *Winterbottom* v. *Wright*, 10 M. & W. 109.

Nor could this defendant be found to be jointly liable with the Boston and Maine Railroad, on the ground stated in *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575, 581. There was here no concurrent negligence of the two railroad corporations; the proximate cause of the injury and death of the plaintiff's intestate, as the case was left by the plaintiff's evidence, was the negligence of the Boston and Maine Railroad, for which this defendant was in no way liable.

No cause of action was shown against this defendant; and in each case the order must be

Exceptions overruled.

JOHN D. TURNER, administrator with the will annexed, *vs.* CHARLES M. WILLIAMS, administrator.

Middlesex. March 8, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Fraud. Death. Marriage and Divorce. Contract, Implied in law. *Evidence*, Presumptions and burden of proof.

At the trial of an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely representing to him that she

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was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, it appeared that the first husband of the defendant's intestate left her four years before she married the plaintiff's testator, and a witness testified that fourteen years after such marriage he "knew from information from" the defendant's intestate that her first husband "was at Bridgeport, Connecticut." *Held*, that the question whether such first husband was living at the time of the second marriage was for the jury.

In an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely representing to him that she was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, the burden of proving that the first husband was living and was not divorced from the defendant's intestate at the time of the second marriage rests upon the plaintiff throughout the trial.

At the trial of an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely representing to him that she was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, there was evidence tending to show that the first husband was living at the time of the second marriage, that the defendant's intestate had resided continually in Middlesex County in this Commonwealth after her first husband left her and that the only divorce proceedings in that county in which any one of her name was a party was a libel which she had filed four years before her second marriage for a divorce from her first husband, and that the libel was dismissed a year before the second marriage. There was testimony, introduced without objection, that the plaintiff's testator during his life had said that the defendant's intestate "was a divorced woman and that she had told him she was a divorced woman." *Held*, that the question, whether at the time of the second marriage the defendant's intestate was married to her first husband, was for the jury.

Where, at the trial of an action a material question is whether one of the parties to a marriage was at the time of such marriage still married to another person, and evidence is introduced on both sides, the validity of the second marriage becomes a question of fact to be proved in the light of all the circumstances and of the reasonable inferences from them, and the presumption of innocence of the party alleged to have committed bigamy is not so much stronger than any other evidence or presumption as to compel the assumption of death or divorce in order to infer the existence of such innocence.

CONTRACT for money had and received by the defendant's intestate to the use of the estate of the plaintiff's testator, the declaration alleging that the defendant's intestate procured from the plaintiff's testator three life insurance policies from which

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she received $8,500 on October 7 and 14, 1895, and also procured real estate from him from the sale of which she received $4,000 on July 18, 1899, and that she fraudulently concealed from the plaintiff's testator and his legal representatives the cause of action until within six years before the date of the writ. Writ dated January 16, 1906.

The case was tried before *King*, J. Besides the facts stated in the opinion, there was evidence tending to show that the defendant's intestate always had lived in Middlesex County, that the only libel for divorce in which a person of her name was a party was the one mentioned in the opinion; that, during the period when the plaintiff's testator and the defendant's intestate were living together as man and wife, i. e. from August 19, 1874, until September 19, 1895, he took out three life insurance policies payable to her as his wife, the proceeds of which, received by her after his death, and interest thereon made up six of the items of the declaration; and that on June 13, 1894, he deeded to her real estate which she sold after his death, the proceeds of which, with interest, made up the remaining items of the declaration.

Other facts are sufficiently stated in the opinion.

At the close of the plaintiff's evidence, the presiding judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

M. M. Johnson, (*G. N. Merritt* with him,) for the plaintiff.

J. J. Pickman, for the defendant.

RUGG, J. This is an action of contract to recover money alleged to have been had and received to the use of the estate of the plaintiff's testator because obtained through the fraud of the defendant's intestate. The fraud claimed was that the defendant's intestate, under the name of Emma E. Ingalls, induced the plaintiff's testator, Joseph Turner, to marry her and settle property upon her by falsely representing herself to be a single woman. There was evidence tending to show that the defendant's intestate under the name of Emma E. Ingalls was from 1858 to 1870 the wife of Nelson N. Ingalls, living with him at Lowell in this Commonwealth; that in or before 1870 he had deserted her; that his place of residence was thereafter for some time unknown to her, and that at one time he had lived in New

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Hampshire, but never afterwards in Lowell; that in 1870 she filed a libel for divorce against Ingalls, which was dismissed in 1873; that in 1874 she was married to Joseph Turner, having represented to him that she was a divorced woman, and lived with him in Lowell until his death on September 19, 1895. One Marsh testified that on September 5 or 6, 1888, he "knew from information from" the defendant's intestate that her first husband was at Bridgeport, Connecticut. "She said something about his being down there"; and that he thought he told the plaintiff "something about his step-mother's * telling me about Ingalls being in Bridgeport, and she asked me to inquire him out when I went there." There is no evidence that he was ever heard from after that date. In the Superior Court a verdict was directed for the defendant.

The point at issue as the case was tried was whether the defendant's intestate, at the time of her marriage with the plaintiff's testator, was capable of entering into a valid marriage. The decision hinged upon the question whether at that time her former husband was living and undivorced. This was a fact to be determined upon all the evidence.

Plainly there was sufficient evidence to support a finding that he was then alive. He was living in 1870, three years before, and there was the testimony of the witness Marsh to the effect that he received information from the defendant's intestate in 1888 that her first husband was then living in Connecticut. In view of this evidence it was error for the court to rule as matter of law that her first husband was not living in 1874 at the time of the second marriage of the defendant's intestate.

It is said in the exceptions that the plaintiff's testator, before the marriage now questioned, "stated to his children, and others, that said Emma was a divorced woman and that she had told him she was a divorced woman." This appears to have been admitted without objection, and, being then in, was entitled to its natural probative force. Assuming that this evidence was admitted under R. L. c. 175, § 66, as having been made in good faith upon the personal knowledge of the declarant, the direction of a verdict for the defendant was not warranted. The

* The plaintiff was a son of Joseph Turner.

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question to be decided was whether the prior marriage of the defendant's intestate was dissolved at the time of her marriage with the plaintiff's testator. Proof that it was valid and subsisting was the burden assumed by the plaintiff, and this burden rested on him throughout the trial. Although there was oral testimony to the effect that this marital relation had been dissolved by divorce, it was nevertheless open to the plaintiff to argue that the statements to this effect were made by interested persons, who were mistaken, discredited, unreliable, deceived or deliberately attempting to deceive, and therefore not entitled to belief.

It is urged in support of the ruling, that the law has such a tender regard for solemnized marriage and for the assumption of innocence as to presume strongly that all apparent obstacles were removed so that its validity may be established. It has often been decided or intimated by way of dictum that death or divorce of one of the parties to a prior marriage will be presumed in order to support such a second one.* This train of cases appears to have had its origin in *The King* v. *Twyning*, 2 B. & Ald. 386, which "has been much misunderstood" as is pointed out in *Lapsley* v. *Grierson*, 1 H. L. Cas. 498, 505, where it is explained. Where there is no extrinsic evidence either way, the legality of a marriage, like sanity, continuance of life, and regularity of acts of public officers, will be assumed. But where it is attacked and evidence is introduced tending to impeach it, then a question of fact arises to be proved in the light of all the circumstances and the reasonable inferences from them. The presumption of innocence is not so much stronger than any other as to compel the assumption of death or divorce in order to infer its existence. The unsoundness of such a contention becomes apparent when applied baldly to every conceivable state of facts. A marriage could not be ruled as a

* *Potter* v. *Clapp*, 203 Ill. 592, 600. *Hunter* v. *Hunter*, 111 Cal. 261. *Cash* v. *Cash*, 67 Ark. 278. *Hadley* v. *Rash*, 21 Mont. 170. *Alabama & Vicksburg Railway* v. *Beardsley*, 79 Miss. 417, 424. *Scott* v. *Scott*, 77 S. W. Rep. 1122. *Montgomery* v. *Bevans*, 1 Sawyer, 653, 666. *Erwin* v. *English*, 61 Conn. 502, 510. *Lockhart* v. *White*, 18 Texas, 102. *Carroll* v. *Carroll*, 20 Texas, 731, 742. *Smith* v. *Knowlton*, 11 N. H. 191, 196. *Greensborough* v. *Underhill*, 12 Vt. 604. *Palmer* v. *Palmer*, 162 N. Y. 130.

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matter of law to be valid by reason of the presumption of innocence, if other evidence showed that a month or a day before its solemnization one of the parties was living with a legal and youthful spouse of good health and non-dangerous employment. The law jealously regards the marriage relation and makes reasonable assumptions in its favor, but it has no special regard for second in preference to first marriage. The burden of proof in the absence of conflicting evidence may sometimes determine the result. The state of health, age, occupation or prospective journey of a given individual may warrant the inference of death within a brief time. But ordinarily whether one is alive on any given date, within the period of seven years of unexplained absence, is a fact to be determined upon all the probabilities arising in a particular case. Circumstances may exist, which would make reasonable the inference of a divorce. But there is no inflexible rule by which it can be invoked to protect subsequent nuptials. There is no absolute presumption of innocence, which will of itself prove the validity of a subsequent marriage in preference to the continuance of a former one. The validity or invalidity of the marriage drawn in question must be established, by the party upon whom the burden of proof is cast, upon all the facts with the reasonable inferences flowing from them. The law marks no particular consideration as of prevailing consequence in all cases. There is no "sacramental force" in the presumption of innocence over the presumption of the continuance of life or any other status in its nature likely to endure. Presumptions are rules of convenience based upon experience or public policy, and established to facilitate the ascertainment of truth in the trials of causes. There are a few instances of conclusive presumptions; but, where there are conflicting presumptions, one is not as matter of law stronger or weaker than another. The whole case then is thrown open to be decided as a fact upon all the evidence. It is for the sound judgment of the jury to weigh all the circumstances, including the characters of the persons involved and the probability of different lines of conduct, and determine where the truth lies as a matter of common sense unfettered by any arbitrary rule. *Hyde Park* v. *Canton*, 130 Mass. 505. *Commonwealth* v. *McGrath*, 140 Mass. 296, 299. *State* v. *Plym*, 43 Minn. 385. *Reynolds* v. *State*,

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58 Neb. 49, 52. *Williams* v. *Williams*, 63 Wis. 58. *Casley* v. *Mitchell*, 121 Iowa, 96. *Northfield* v. *Plymouth*, 20 Vt. 582, 590. *Lapsley* v. *Grierson*, 1 H. L. Cas. 498. *Regina* v. *Willshire*, 6 Q. B. D. 366, 370. *The King* v. *Harborne*, 2 Ad. & El. 540. *Regina* v. *Lumley*, L. R. 1 Cr. C. 196.

Inasmuch as Nelson N. Ingalls was absent and unheard of for more than seven years after the time to which the testimony of Marsh referred before the death of the plaintiff's testator, so that the presumption of his death would arise, it would seem that the marriage here questioned might be upheld under R. L. c. 151, § 6, as having been entered into with good faith by Joseph Turner and followed by continued cohabitation after the removal of the impediment. This is a fact dependent upon evidence, and could not have been ruled as a matter of law. The effect of this circumstance, as well as the right which in any event the plaintiff may have in the proceeds of the insurance policies, are not before us.

Exceptions sustained.

EDWARD ANDERSON *vs.* TOM B. MIDDLEBROOK & another.

Suffolk. March 4, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Witness, Adverse called under R. L. c. 175, § 22. *Dog. Joint Tortfeasors.*

One who calls the adverse party as a witness under R. L. c. 175, § 22, is not bound by his testimony, and has a right to ask the jury to believe certain facts testified to by him and to disbelieve his explanations of them.

In an action under R. L. c. 102, § 146, against a man and a woman to recover double damages for being bitten by a dog of which the defendants were alleged to be the owners or keepers, the presiding judge refused to rule that there was no evidence on which the jury could find that the dog was kept by the two defendants jointly, and allowed the jury to return a verdict for the plaintiff against both defendants. The man defendant, called by the plaintiff as an adverse witness under R. L. c. 175, § 22, testified that two years before the bringing of the action he sold certain dog kennels, theretofore established on his land and owned by him, together with the good will of the business done there, to the woman defendant, who was in the employ of his wife, that after the sale the dogs continued to be kept on his land, that he accompanied them to various

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dog shows where they were exhibited, that he had accepted the fee for the service of one of the dogs, and that the woman defendant also took the fee for service when she was about. He also testified that he bought food for the dogs. He explained that, in doing the acts to which he testified, he was acting in behalf of the woman defendant, and that he paid over to her the money he received. There also was evidence that the two defendants had been seen walking together accompanied by a group of dogs, including the dog that bit the plaintiff, and that the man defendant had been seen feeding that dog. It further appeared that the kennels had been carried on under the same name before and ever since the date of the bill of sale to the woman defendant. The woman defendant did not appear in court. Evidence was introduced by the defendants that the woman defendant was licensed to keep various dogs on the premises, and there was evidence from which it could have been inferred that the dog which bit the plaintiff was included in the licenses. *Held*, that the evidence warranted a finding that after the delivery of the bill of sale the dogs were kept by the defendants jointly, and that the ruling of the trial judge was right.

TORT under R. L. c. 102, § 146, against Tom B. Middlebrook and Ellen Johnson, for injuries received on July 8, 1907, from the bite of a dog of which the defendants were alleged to be the owners or keepers. Writ in the Municipal Court of the city of Boston dated July 25, 1907.

The declaration contained six counts, the first of which alleged that the two defendants were at the time of the injury the joint keepers of the dog which caused the injuries; the second count alleged that the two defendants were the joint owners of the dog at the time; the third count that the defendant Johnson was the keeper of the dog at the time; the fourth count that the defendant Johnson was the owner of the dog at the time; the fifth count that the defendant Middlebrook was the keeper of the dog at the time; and the sixth count that the defendant Middlebrook was the owner of the dog at the time.

On appeal to the Superior Court the case was tried before *Crosby*, J.

At the close of all the evidence, the defendants asked the judge to give to the jury the following instructions, among others:

"9. There is no evidence from which the jury can find that the two defendants owned the dog which produced the injury jointly.

"10. That there is no evidence in the case from which the jury can find that the dog in question was kept jointly by the two defendants."

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"13. That upon all the evidence the jury cannot find a verdict against both of the defendants."

The judge gave the ninth instruction as requested, but refused to instruct the jury as requested by the defendants in the tenth and thirteenth requests, and instructed them that there was evidence in the case from which the jury could find that the dog in question was kept jointly by the two defendants, and that upon all the evidence the jury could find a verdict against both defendants.

The jury returned a verdict for the plaintiff against both defendants. They assessed the damages sustained by the plaintiff in the sum of $175, and doubled that amount under the provision of the statute, assessing the total damages in the sum of $350. The defendants alleged exceptions.

S. R. Cutler, for the defendants.

E. Field, (*H. L. Brown* with him,) for the plaintiff.

LORING, J. The only question presented by this bill of exceptions is whether the jury were warranted in finding that the dog which bit the plaintiff was kept jointly by both defendants on July 8, 1907, the day in question.

The defendant Middlebrook testified that before May, 1905, certain dog kennels, called the Revere Collie Kennels, had been established by him on premises owned by him, and on that day he had sold all the dogs and the good will of the business done there under the name of the Revere Collie Kennels to the defendant Ellen Johnson, who "was in the employ of his, Middlebrook's, wife." That after that date the dogs were kept on these same premises owned by Middlebrook, that Middlebrook had accompanied the dogs to various dog shows where the dogs were exhibited, and that he had accepted the fee for service of one of the dogs, and that the defendant Johnson also took the fee for service when she was about. He also testified that he had bought food for the dogs. It is true that Middlebrook testified that he never had received any benefit or profit from any dogs kept on the premises since the sale in 1905; that when he took the dogs to shows it was done as a favor to the defendant Johnson, and that the fee for service received by him was turned over to her and the food bought by him was bought for the defendant Johnson. But, the plaintiff having called the defendant as an

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adverse witness under the statute (R. L. c. 175, § 22), was not bound by his testimony. *Emerson* v. *Wark*, 185 Mass. 427, and so the jury could accept the facts testified to by him and disbelieve the explanations. *Hankinson* v. *Lynn Gas & Electric Co.* 175 Mass. 271.

There was also evidence that both defendants had been seen walking together accompanied by a group of dogs, including the dog that bit the plaintiff, and that the defendant Middlebrook had been seen feeding the dog in question. It was in evidence further that the kennels had been carried on under the same name, to wit, Revere Collie Kennels, since the date of the bill of sale.

The defendant Johnson, to whom Middlebrook made the bill of sale of the Revere Collie Kennels as testified to, who "was in the employ of his, Middlebrook's, wife," did not appear in court.

"Evidence was introduced by the defendants that the defendant Johnson was duly licensed, in accordance with the provisions of law, to keep various dogs on the said premises; and from the description contained in several of the licenses, which were introduced in evidence, the jury might have inferred that the dog which caused the injury was included in the number so licensed."

We are of opinion that this evidence warranted a finding that after the bill of sale the dogs were kept by the defendants jointly within the rule laid down in *Barrett* v. *Malden & Melrose Railroad*, 3 Allen, 101; *Collingill* v. *Haverhill*, 128 Mass. 218; *McLaughlin* v. *Kemp*, 152 Mass. 7; *Whittemore* v. *Thomas*, 153 Mass. 347; *O'Donnell* v. *Pollock*, 170 Mass. 441; *Boylan* v. *Everett*, 172 Mass. 458.

Exceptions overruled.

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JOHN A. JOHNSON, administrator, *vs.* MILTON A. CHANDLER & another.

Middlesex. March 5, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Negligence, Due care of plaintiff.

If a boy, a little less than fifteen years of age, when in the basement of a building where he is employed, sees a freight elevator about two or two and one half feet above the basement floor, and, after the elevator has started, comes toward it with a pail in his hand, calls out "Wait a minute," shoves the pail upon the elevator and then attempts to jump on, but, there not being room enough for him to jump on, he lands on his stomach and is crushed between the elevator and the floor above, he is negligent as matter of law.

TORT, with counts at common law and under the employers' liability act, by the administrator of the estate of Gustaf P. Johnson, for the conscious suffering and death of the plaintiff's intestate, caused by his being crushed by a freight elevator on July 3, 1905, when he was attempting to board the elevator in the basement of the building numbered 122–126 on Summer Street in Boston, where the defendants carried on the hardware business, the plaintiff's intestate being a few days less than fifteen years of age, and having been in the employ of the defendants for two and one half days. Writ dated January 20, 1906.

At the trial in the Superior Court before *Bond*, J., the following facts appeared: On the day of the accident an expressman named Hurley came to the building occupied by the defendants for the purpose of delivering goods to one of the tenants other than the defendants. He lost a paper down the elevator shaft, and an employee of the defendants named Newcomb volunteered to get it for him. Either Newcomb or the expressman ran the elevator up to the street level, and then went down in it to the basement, stopping the elevator car from two to two and a half feet above the basement floor. After Newcomb had reached in under the car and got the lost paper, the car started up again. It did not appear who started it, as Newcomb and the expressman each denied that he did it. As the elevator started, Newcomb saw the plaintiff's intestate coming toward

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the elevator with a pail. The boy called out, "Wait a minute." He then shoved his pail upon the elevator, and attempted to jump on. Newcomb tried to get him off, and asked him what he was doing. The expressman pulled the rope to stop the car. Before he could stop it, however, the elevator caught the plaintiff's intestate at the waist as he was trying to get upon the car, and crushed him between the car and the floor above.

At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

F. W. Campbell, (*C. H. Johnson* with him,) for the plaintiff.

W. H. Hitchcock, for the defendants, was not called upon.

LORING, J. It appeared from the plaintiff's evidence that the elevator was from two to two and a half feet from the basement floor when it was started by Newcomb or by Hurley, and that after it started the plaintiff's intestate said "Wait a minute," shoved his pail upon the elevator and then attempted to jump on himself. His own witness, and the only one who saw what happened, testified that when he attempted to jump on "there was not room enough for him to jump on." The plaintiff's intestate landed on his stomach, and before Newcomb or Hurley could stop the elevator he was caught between the floor of the elevator and the top of the elevator door.

We are of opinion that as matter of law the plaintiff's intestate was guilty of negligence, although he was a little less than fifteen years of age.

The entry must be

Exceptions overruled.

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RICHARD WARE *vs.* ROBERT S. MINOT, trustee.

Suffolk. March 12, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Devise and Legacy.

A widow, having one son, R., who was her only prospective heir and afterwards became her heir, died leaving a holographic will, of which the residuary clause was as follows: "All the rest, residue and remainder of my property of every description whatever, real, personal and mixed, . . . I bequeath to my said son, R. If the said R. shall not survive me, or if he shall die leaving no will duly executed by him, or if he shall die leaving no lineal descendants, then in that case it is my wish, and I so direct, that it, the property above mentioned, shall at my son's death pass in equal shares to my nieces, daughters of my late sister, E. and to the lawful, living children of either of them who shall then be dead, if any, such last named to take the share which would have gone to their mother had she continued to live." *Held*, that, in the real estate left by the testatrix, her son took a life estate, with a remainder to such persons as he by will might appoint, or, in default of such appointment, to his lineal descendants, or, if there were no lineal descendants living at his death, then to the nieces of the testatrix.

BILL IN EQUITY, filed in the Probate Court for the county of Suffolk on December 19, 1907, alleging

1. That Ellen M. Ware of Washington in the District of Columbia, died on August 31, 1906, leaving a will which was proved in the county of Suffolk on November 22, 1906; that the plaintiff and Albion Parris of Washington were named as executors in this will, and were appointed and qualified as such.

2. That at the time of her death Ellen M. Ware was seised and possessed of one undivided half part of a certain parcel of real estate situated on Essex Street and East Street in Boston.

3. That on July 11, 1907, the plaintiff presented to the Probate Court for the county of Suffolk a petition praying for the appointment of Robert S. Minot, or some other suitable person, as trustee to sell and convey the undivided half part of said real estate situate on Essex Street and East Street in Boston; that on this petition it was ordered and decreed by the judge of probate for the county of Suffolk that Robert S. Minot be appointed trustee with authority to sell said undivided half part for

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$133,500, and to invest the proceeds thereof simultaneously in shares or certificates to be issued by said Minot as trustee under the Willis-Ware real estate trust agreement, and to hold and apply such shares or certificates for the benefit of the persons who would have been entitled to said undivided half part of said real estate if such sale had not been made.

4. That in accordance with this decree Minot sold said real estate (the plaintiff joining in the conveyance thereof) and invested the proceeds, namely, $133,500, in shares of said Willis-Ware real estate trust, and at the time of the filing of the bill said shares stood in the name and were in the possession of said Minot as trustee under said decree.

5. That the plaintiff was informed and believed, and therefore averred, that the only persons who might or could be entitled to any interest in said undivided half part of said real estate if such sale had not been made (other than Robert S. Minot) were the plaintiff, Emily W. Pierce of Portland, Maine, Charlotte H. Mansfield of Portland, Maine, and certain minors named, the children of Charlotte H. Mansfield, and any issue not yet born of said Emily W. Pierce and Charlotte H. Mansfield.

The plaintiff prayed

1. That the court should determine what persons, if any, other than the plaintiff would have been entitled to said undivided half part of said real estate if such sale had not been made, and what the respective rights and interests of the parties were therein.

2. That said trustee, Robert S. Minot, be ordered to transfer and assign said shares in the Willis-Ware real estate trust to the plaintiff, and that the court should make such other order or decree with reference to said shares as might seem meet and proper.

The will of Ellen M. Ware, of which a copy was attached to the bill, was as follows:

"I, Ellen M. Ware of the City of Washington, D. C., do make and declare this my last will and testament.

"My real estate situated in the City of Portland, Maine, I leave in trust to the executors of this will to be disposed of as follows:

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"All the interest and rents accruing from my share of the Portland estate to be applied to paying off the sums advanced by me for the improvement of the property owned by us in common. When such indebtedness is paid to my son Richard Ware interest and principal, then one half of the income of such estate I wish to be paid regularly to Emily W. Pierce.

"The other half of the income to be applied to the payment of various sums of money loaned by me to Warren W. Mansfield amounting in all to $8000.00; all these payments of indebtedness to go to my son Richard Ware. When all these debts are paid, then the whole of such estate in Portland, Maine, I wish to be handed over to said Emily W. Pierce and Charlotte H. Pierce (Mansfield) as their own freehold, half to each.

"To Miss Emily W. Dana of Falmouth, Maine, I bequeath six thousand dollars in memory of pleasures and obligations of the past.

"All my household furniture, all my silver plate, jewelry, clothing and personal articles I give to my son Richard Ware.

"All the rest, residue and remainder of my property of every description whatever, real, personal and mixed, of whatever the same may consist, wherever the same may be situated, and whenever the same may have been acquired, whether before or after the execution of this will, I bequeath to my said son, Richard

"If the said Richard shall not survive me, or if he shall die leaving no will duly executed by him, or if he shall die leaving no lineal descendants, then in that case it is my wish, and I so direct, that it, the property above mentioned, shall at my son's death pass in equal shares to my nieces, daughters of my late sister, Emily H. Pierce and to the lawful, living children of either of them who shall then be dead, if any, such last named to take the share which would have gone to their mother had she continued to live.

"I appoint my son, Richard Ware, and Mr. Albion K. Parris, both of Washington D. C. to execute this will; and I request that neither shall be required to give bonds.

"Ellen M. Ware."

[Here followed an attesting clause and the signatures of three witnesses.]

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The Probate Court appointed Charles B. Barnes, Jr., Esquire, guardian *ad litem*, to represent minor children and persons unborn. He filed a report as such guardian, and the case was heard in the Probate Court upon his report by *George*, J. He made a decree declaring, among other things, that by the will the plaintiff, "Richard Ware, took a qualified fee in the one undivided half part of the real estate mentioned in the petition, being part of the residue determinable in the event of his death leaving no will or lineal descendants, with an executory devise over to the nieces of the testatrix, daughters of her late sister, Emily H. Pierce, and to the lawful, living children of either of them who shall then be dead, by right of representation." The plaintiff, as the sole child and heir at law of Ellen M. Ware, appealed.

Upon the appeal the case was heard by *Sheldon*, J. He ruled as a matter of law that the will of Ellen M. Ware created an executory devise, and that the plaintiff did not take an absolute fee. He ordered that the appeal be dismissed and that the case be remitted to the Probate Court, without passing upon the question of the power of the court on this bill to act upon the removal of the trustee. At the request of the plaintiff, he reserved the case, upon the pleadings and the evidence, for determination by the full court, such decree to be entered as justice and equity might require. The evidence was reported by a commissioner appointed under Equity Rule 35. By a photograph of the will of Ellen M. Ware, which was put in evidence by agreement, it appeared that the will was in the handwriting of the testatrix.

C. F. Choate, Jr., for the plaintiff.

H. Parker, for the defendant.

C. B. Barnes, Jr., guardian *ad litem*, submitted a brief.

RUGG, J. Ellen M. Ware by her holographic will gave certain real estate in trust, one pecuniary bequest, and to her son Richard her household furniture and other personal effects, and then proceeded as follows:

"All the rest, residue and remainder of my property of every description whatever, real, personal and mixed, of whatever the same may consist, wherever the same may be situated, and whenever the same may have been acquired, whether before or

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after the execution of this will, I bequeath to my said son, Richard

"If the said Richard shall not survive me, or if he shall die leaving no will duly executed by him, or if he shall die leaving no lineal descendants, then in that case it is my wish, and I so direct, that it, the property above mentioned, shall at my son's death pass in equal shares to my nieces, daughters of my late sister, Emily H. Pierce and to the lawful, living children of either of them who shall then be dead, if any, such last named to take the share which would have gone to their mother had she continued to live."

This residuary clause disposed of both real and personal estate, but we are asked now to determine only the nature of the estate taken by Richard Ware in land in Boston.

The rule for the construction of wills followed by courts in recent times is to ascertain the intent of the testator from the whole instrument, attributing due weight to all its language, and then give effect to that intent unless prevented by some positive rule of law, rather than to try to make the interpretation of particular words or phrases in one instrument square with that before given to somewhat similar words used by some one else under other surroundings to accomplish a more or less different end. *McCurdy* v. *McCallum*, 186 Mass. 464. A few combinations of words have become so fixed in their meaning by long and unvarying use as to be rules of property. But ordinary canons for the interpretation of wills, having been established only as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it. *Crapo* v. *Price*, 190 Mass. 317, 319. *Jewett* v. *Jewett*, 200 Mass. 310, 317. It is permissible also to look at all the material circumstances in the light of which the will was executed in order to comprehend the sense and purpose of the language employed.

The present testatrix was the mother of the petitioner, who was her only prospective heir. The latter, at the time of the execution of the will, was past forty years of age, and had never married. It was in her mind that the son might predecease her, that, surviving her, he might also die intestate, and that, although it was possible that he might leave lineal descendants, he had

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reached middle age without having married, and might never do so. Being legally untrained, she attempted to express her thoughts on paper. She gave the residue to the son and devised it in the event of the son dying before her. Then by plain inference she gave him the power, if he survived her, to dispose of it by will, and by clear intendment also she provided that his lineal descendants should take it, if he failed to exercise the power. She expressed these last two alternative dispositions by the same form of subjunctive construction. But the meaning is the same as if she had expressly conferred the power, or made a devise to his offspring in the event of his intestacy.

If she had intended to give the son a fee, it was idle to confer upon him a power to appoint by will. The express gift of this power by implication excludes the right to convey or dispose in any other way. *Kent* v. *Morrison*, 153 Mass. 137. The devise over to lineal descendants is strong evidence that she did not intend the estate of the son to possess the incident of descent to his heirs, and that therefore it was not a fee. *Baker* v. *Thompson*, 162 Mass. 40. The language of the gift to the son contains no technical words of inheritance, so that the estate given him is a question of construction. *Dorr* v. *Johnson*, 170 Mass. 540. There are no words like "rest" or "remaining estate" sometimes indicative of a fee or an absolute power of disposal (*Kelley* v. *Meins*, 135 Mass. 231, 233), for the gift over is of "it, the property above mentioned," which means the entire residue and is language apt to create a technical remainder. Although the clause is not grammatically or logically perfect, its meaning is not hard to discover. The testatrix intended the property, in the event that the son did not survive her, to go to the nieces, but if he survived her she intended it to go to him, not with the right to convey it away during his life, but with power to dispose of it by will, a power which could operate on the property only after his decease; and she further intended that, if he did not make a will, it should go not to his heirs generally but to his lineal descendants surviving him, and finally that, in default of a will and such descendants, it should go to her nieces. The language expressive of this intent can in no part be brushed aside nor overridden without doing violence to the designs of the testatrix as written by her. There is in the will no word or phrase, which

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of itself, by force of some positive rule of law, regardless of other language, creates a particular kind of estate in any of the donees. Therefore the numerous cases, of which *Bassett* v. *Nickerson*, 184 Mass. 169, 173, and *Galligan* v. *McDonald*, 200 Mass. 299, are illustrations, are not in point. Although the devise to the son is not technically phrased to create a life estate, it appears from what follows in the will that this is all that was intended. Hence R. L. c. 135, § 22, is not applicable. The legal consequence of the language employed, giving all of it due effect, is a life estate to the son, with remainder to such persons as he by will may appoint, or, in default of such appointment, to his lineal descendants (R. L. c. 134, § 5; c. 154, §§ 7, 8), or if there are no descendants living at his death, then to her nieces.

By emphasizing some parts of the will to the exclusion of others, or by putting one part of the testator's intent above another, a different conclusion might be reached. But we have no right to do that. All the words of the will are satisfied and given some weight only by holding that the son took an estate for his life with power of appointment and remainders over in default thereof, as have been stated. The decree of the Probate Court is reversed, and a decree is to be entered in accordance with this decision.

So ordered.

FRED A. DIX *vs.* OLD COLONY STREET RAILWAY COMPANY.

Norfolk. March 18, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, LORING, & SHELDON, JJ.

Negligence, Street railway, Due care of plaintiff. *Street Railway.*

Although it is not the duty of a street railway company, across whose track an open trench has been dug by a contractor constructing a system of sewers under a contract with a town, to guard the sewer trench or to remove and replace barriers across its track to enable its cars to pass, yet if, on a dark night, its servants operating one of its cars, on coming to the trench, find a barrier across the track, and no one there to remove it, and thereupon remove the barrier and fail to put it back, leaving the trench unguarded, and a traveller riding a bicycle upon the track rides into the trench and is injured, in an action against the

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street railway company for his injuries thus caused, there is evidence of negligence on the part of the defendant.

In an action against a street railway company for personal injuries from riding a bicycle in the evening upon a track of the defendant on a highway into a trench dug across the track, it being alleged that a servant of the defendant had removed a barrier guarding the trench and negligently had failed to put it back, there was evidence that it was a dark night, that the plaintiff was following at a distance a car of the defendant, and, when six hundred feet away, saw it pass over the place where the accident happened, that the trench crossed the track at right angles, was four or five feet wide, and had been dug by contractors who were constructing a sewer system under a contract with a town. There were piles of dirt on both sides of the track and at the nearer and farther side of the trench. The plaintiff testified that he was riding his bicycle on the track because it was better going on the stone pavement between the rails than it was outside where the sewer recently had been constructed and the street was rough. There was no barrier or light across the track when the accident happened. The evidence did not warrant a finding that there was a barrier on the nearer side of the trench before the car passed which the plaintiff saw when six hundred feet away, but there was evidence that there was a barrier with a lantern hung on it within about ten feet from the trench on the side away from the plaintiff before this car had passed, that this barrier was removed by a servant of the defendant and that it was not put back. *Held*, that there was evidence warranting a finding that the accident was caused by the failure to put back the barrier about ten feet from the trench on the farther side; *also*, that there was evidence that the plaintiff was in the exercise of due care.

TORT for personal injuries sustained by the plaintiff on the evening of October 3, 1902, when riding a bicycle on the portion of the highway between the rails of the defendant's single track on the easterly side of Bussey Street in the town of Dedham, as described in the opinion. Writ dated December 4, 1902.

In the Superior Court the case was tried before *Fox*, J. The plaintiff also brought an action against the contractors, who dug the trench into which he fell, and the two cases were tried together.

The first count of the plaintiff's declaration against the defendant railway company alleged the removal of, and the negligent omission by the defendant's agents and servants to replace, lanterns or barriers placed at or near the excavation. The second count alleged that the defendant's grant of location required it to keep in repair so much of the street as lay between the rails and that its agents and servants negligently suffered it to be defective.

The findings warranted by the evidence are stated in the opinion.

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At the close of the plaintiff's evidence the defendant railway company rested, and asked the judge to instruct the jury as follows:

"1. Upon all the evidence which the jury properly may consider, the plaintiff cannot recover against this defendant.

"2. There is no evidence that any breach of legal duty which this defendant owed the plaintiff caused or contributed to the plaintiff's injury.

"3. The defendant company had a lawful right to operate its cars over the excavation on Bussey Street in which it is alleged the plaintiff fell, and to remove guards or barriers, if any, in the way of the passage of such cars. It was under no obligation to the plaintiff to replace such guards or barriers or the signals, if any, thereon."

"6. It was the duty of the contractors who dug the excavation in the highway (1) as to the plaintiff, to use proper barriers and safe-guards to prevent him, if travelling on the highway in the exercise of due care, from falling into it; and (2) as to the defendant street railway company, to remove any such barriers for the passage of its cars in the lawful exercise of its franchise."

The judge refused to give these instructions.

He directed the jury to return a verdict for the defendant railway company on the second count. Upon the first count, he instructed the jury, in substance and so far as was material to the exceptions, as follows:

"The first count proceeds upon the theory that the servants of the defendant company, for whose acts within the scope of their duty, the company is of course responsible, — meddled with the barriers that were put there by somebody else, removed the barriers which were put there, and failed to replace them. This is substantially the theory upon which the first count proceeds, and that question I leave to you.

"The question is whether they did that, — and that is the only ground upon which the plaintiff can proceed against the street railway company, — that is, that the servants of the company finding the trench protected by barriers removed these barriers and left the trench unprotected and because of that the plaintiff sustained his injury. Now, unless you find this is so,

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you must bring in a verdict for the defendant in the railway case.

"Trumbull and Company [the contractors] were under obligation to provide a reasonable barrier for the protection of the public against the pit which they were digging, to take reasonable precautions having regard to the time and place and the amount of travel, for the protection of the public; reasonable care to see that the barriers put up were maintained: and having regard to that duty, the duty of maintaining reasonable barriers for the protection of the public, it is proper for you to take into account the circumstances in this case that they knew that a railroad track was across this trench and that the barriers it put up would have to be removed from time to time in order to allow the cars to go through.

"In order to find for the plaintiff against the street railway company, you must be satisfied by the weight of the evidence that the excavation was left unguarded at the time the plaintiff fell into it, by reason of the fact that the servants of the railway company in running its cars over the excavation had failed to replace guards or signals which they found were protecting the trench."

The jury returned a verdict for the plaintiff against the defendant railway company in the sum of $4,000, besides returning a verdict against the contractors. The defendant railway company alleged exceptions.

J. S. Allen, Jr., (*Asa P. French* with him,) for the defendant.

E. Greenhood, (*M. B. Holsberg* with him,) for the plaintiff.

LORING, J. The plaintiff, between 8.30 and 9 o'clock on a dark night in October, was riding a bicycle on Bussey Street in Dedham, down grade, toward East Dedham. As he came over the brow of a hill about six hundred feet away from Tracy Square he saw a car ahead of him, stopped in the Square. Tracy Square is formed by the junction of Bussey Street and Colburn Street, which run at right angles to each other. At this time he turned on to the defendant's track which lies on the left hand side of Bussey Street going south, as he was going. He testified that he did this because it was better riding on the stone pavement between the rails than it was outside where the sewer had been recently constructed and the street was rough.

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He saw the car start. He then rode on, looking ahead, with his machine in control, going from six to eight miles an hour (he testified to six on cross-examination and to seven or eight on direct), and fell into an unguarded sewer trench four or five feet wide and running at right angles to the track, across the whole width of the track and further. How much further did not appear. There was no barrier or light across the track at that time. The trench was dug by contractors who were constructing a system of sewers under a contract with the town of Dedham.

The defendant asked the presiding judge to instruct the jury that it "had a lawful right to operate its cars over the excavation on Bussey Street in which it is alleged the plaintiff fell, and to remove guards or barriers, if any, in the way of the passage of such cars. It was under no obligation to the plaintiff to replace such guards or barriers or the signals, if any, thereon"; and that there was no evidence on which a verdict for the plaintiff could be found.

The plaintiff was allowed to go to the jury on the ground that the defendant's servants took away a barrier or barriers put there by somebody else to protect the trench, and negligently failed to put them back.

Exceptions were taken to the refusal to give the rulings asked for, and to the ruling given. The plaintiff had a verdict.

1. The presiding judge was right in refusing to give the first of the two rulings asked for by the defendant. It is true that the defendant was not under the duty of guarding the sewer trench constructed by contractors for the town. *Leary* v. *Boston Elevated Railway*, 180 Mass. 203. *Hyde* v. *Boston*, 186 Mass. 115. Nor was it under the duty of removing and replacing barriers across its tracks to enable its cars to pass. *Boston* v. *Coon*, 175 Mass. 283, 284, 285. *Prentiss* v. *Boston*, 112 Mass. 43.

But it does not follow from this that the defendant would not be liable if its servants in charge of one of its cars, on coming to the trench and finding a barrier across its tracks and no one to remove it, removed the barrier and did not put it back, leaving the trench unguarded. In such a case the town or its contractors have not done the duty they owed to the railway company to remove and replace the barriers they put up, when

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necessary to enable the defendant's cars to pass. For that reason the railway company had to do something which it ought not to have had to do. But if the railway company undertook to do what it ought not to have been forced to do, it is bound to exercise due care, and, if it does not, it is liable for injury caused by its negligence. *Phinney* v. *Boston Elevated Railway*, 201 Mass. 285. The situation is not unlike that of a landlord who is not bound to make repairs. He is not liable for not making them, but if he voluntarily undertakes to make them and makes them negligently he is liable. *Gill* v. *Middleton*, 105 Mass. 477. *Galvin* v. *Beals*, 187 Mass. 250, 252, 253.

2. It is at least doubtful whether the evidence warranted a finding that there was a barrier on the north of the trench before the car passed which the plaintiff saw when at the brow of the hill, six hundred feet away. But the evidence did warrant a finding that there was a barrier with a light on it within about ten feet of the trench on the south side of it before this car passed, and that it was removed by one of the defendant's servants and not put back. The defendant has argued that the removal of a barrier south of the trench could not have caused the injury. On the uncontradicted evidence there were piles of dirt on both sides of the track and across the trench on each side of it. We are of opinion that the jury were warranted in finding that a traveller in the exercise of due care would not have ridden between these piles of dirt when the exit was barred by a barrier running across it some ten feet away, on which a lantern was hung. If that be true, a finding was warranted that the accident was caused by the removal of the barrier on the south side of the trench.

3. We are of opinion that there was evidence that the plaintiff was in the exercise of due care.

The accident happened at night, and the jury were warranted in finding that it was a dark night. In this respect the case is like *Torphy* v. *Fall River*, 188 Mass. 310.

The defendant relies on *MacFarlane* v. *Boston Elevated Railway*, 194 Mass. 183. But in our opinion that case falls on the other side of the line. That was a case where the plaintiff was riding in the daytime and the whole situation was apparent to him. He rode between the rails of a track raised a foot above

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the surface of the street on each side of it, past barriers on one side and a red flag on the other, and where the other side of the street was left entirely open for travel. In the case at bar there were piles of dirt on each side of the track, occupying practically the whole of Bussey Street, and although he could have gone around them by going outside the side lines of Bussey Street through Colburn Street, yet his direct route lay along Bussey Street, and that part of Bussey Street on which the defendant's tracks were laid apparently was open. He had seen it used within a few minutes by one of the defendant's cars. It is true that if he had stopped to think he would have known that a car could pass over a hole when he could not. But whether he ought to have stopped to think and whether he ought to have thought of the possibility of there being a hole there was for the jury.

Exceptions overruled.

MICHAEL J. HORGAN *vs.* METROPOLITAN MUTUAL AID ASSOCIATION.

Suffolk. March 19, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Fraternal Beneficiary Corporation. Mandamus.

A vote of a mutual benefit corporation suspending one of its members from membership for non-payment of an assessment of $1, regularly made, if passed without notice to the member and without giving him an opportunity to be heard, is irregular and unauthorized.

At the hearing upon a petition for a writ of mandamus against a mutual benefit corporation to compel the reinstatement of the petitioner as a member of the respondent, it appeared that by a vote of the respondent the petitioner was suspended from membership for non-payment of an assessment of $1, regularly made, but that the vote was passed without notice to the petitioner and without giving him an opportunity to be heard, and that at the time the assessment became due the petitioner was disabled and was receiving benefits, or should have been receiving them. A by-law of the respondent provided as follows: "A member being at the time sick or disabled and receiving benefits, cannot be debarred from receiving a continuation of such benefits because of his inability to pay his assessment. The president being authorized to deduct from the sums paid him for benefits such amounts as will keep him in good standing, which money so deducted is to be paid to the financial secretary and his receipt

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taken therefor." It also appeared that the petitioner was ill and unfit to work, by reason of general debility from consumption, for a period of about three months ending after his suspension by the vote mentioned above, that a committee was appointed by the respondent under a provision of its by-laws to investigate his sickness or disability, and upon their report sick benefits were paid to him for about five weeks at the regular rate provided for such cases, less $1.50 deducted under the provision quoted above for a death assessment, and for his monthly dues. Upon a report of the financial secretary that the committee had been unable to find the petitioner at home, the respondent voted to drop the petitioner from the sick list and to discontinue giving him sick benefits. It appeared that the petitioner was ready to co-operate with the committee in arranging to meet them and to be where they could find him, and it did not appear that there was any change of residence or of post office address on his part that had any connection with the action of the respondent or with the petitioner's rights in the matter. *Held*, that a writ of mandamus should issue ordering the petitioner's reinstatement.

Upon a petition for a writ of mandamus, brought by a member of a mutual benefit corporation against the corporation, which has suspended him, to compel his reinstatement, where the petitioner alleges and shows that his suspension was wrongful, it is no ground for refusing to issue the writ that the petitioner did not first resort to the provision of a by-law of the corporation on the subject of the reinstatement of a suspended member, if this provision applies only to the case of one who admits that he was suspended rightly, and who, to avail himself of it, must assume the regularity of his suspension and must pay a membership fee and one month's dues in advance, and who also, if reinstated under the by-law, cannot receive benefits until the expiration of a month from the time of his reinstatement.

PETITION, filed on February 10, 1909, for a writ of mandamus, commanding the respondent, a mutual benefit corporation organized under the laws of this Commonwealth, to reinstate the petitioner as one of its members.

The case was heard by *Sheldon*, J., who reported it to the full court as follows:

"I found that the petitioner was elected a member of the respondent on April 30, 1903, and so continued until he was suspended, as hereinafter stated, on June 4, 1908. On March 10, 1908, he became ill and unfit to work because of general debility and consumption, this not being caused from immoral or improper conduct on his part. On that day he wrote a letter to the respondent's secretary, giving notice of his illness, in accordance with section 1, article 5, of the by-laws, and stating that he was about to give up the house where he was then living, and did not know just where he should go to live, but that he could be found at No. 26 Prospect Street, Somerville, on a day's notice in advance. It did not appear that this letter was

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received by the secretary. The respondent's president, under by-laws, article 5, section 3, appointed as a sick committee to investigate the petitioner's sickness or disability, three members, Clune, Dunleavy, and O'Hanlon. The petitioner was then living at No. 9 Skehan Street, Somerville, but his mail was sent to 26 Prospect Street, Somerville, where his daughter lived, and he had arranged to have any mail or notices immediately sent to him by her.

"Clune, of the sick committee, called to see the petitioner at various times at 26 Prospect Street, and at 9 Skehan Street, without finding him. The petitioner met Dunleavy on a car, of which Dunleavy was motorman, and told Dunleavy he could be found at any time by giving a day's notice to 26 Prospect Street. Clune afterwards called at 121 Webster Avenue, to which the petitioner had removed, and left word for the petitioner to meet the committee at the Spring Hill car house, which the petitioner later did, and then again told Clune that, as he was to be in the open air as much as possible during the daytime, by the doctor's order, and might not be in when one of the committee called without notice to him, he could always be found by sending notice in advance to 26 Prospect Street, but said he would come to the car barn to meet the committee.

"May 3, 1908, the petitioner received from Harrington, the division collector, the amount of his sick benefits ($38) from March 17 to April 23, less one dollar and fifty cents, of which one dollar was deducted for death assessment (No. 213) which had been duly levied, and fifty cents for his monthly dues for April. This sick benefit was voted to him by the respondent association at its meeting of April 23, 1908.

"After this meeting Clune went twice to 121 Webster Avenue, but without sending any previous notice, to see the petitioner for the purpose of reporting about his case, but did not find him. The petitioner did not go at all after April 26, 1908, to the Spring Hill car barn to meet the committee. On May 7, 1908, at a regular meeting of the respondent, Harrington informed the members that Clune had been unable to find the petitioner at his home; and the association voted to drop the petitioner's name from the sick list, and to discontinue giving him sick

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benefits. This was without any other report than as already stated.

"On April 14, 1908, an assessment was duly levied of one dollar, being assessment No. 214, payable on or before May 14, 1908. The petitioner had due notice of this assessment, but did not pay it. He knew, before the time for its payment expired, that he had been dropped from the sick list, and that no sick benefit was to be paid to him. He was not given a hearing, or any notice of an opportunity to be heard, before his name was dropped from the sick list, or before he was suspended on June 4, 1908.

"He continued sick and unable to work until after June 4, 1908. He was suspended from membership by vote on June 4, 1908, for non-payment of assessment No. 214.

"Without ruling on the questions whether the petitioner was properly dropped from the sick list, I was inclined to the opinion that the petition could not be maintained, but, at the petitioner's request, I report the case on the petition and answer and these facts to the full court; the petition to be dismissed, or the writ of mandamus to be issued, or such other order to be made as law and justice may require."

The by-laws of the respondent were put in evidence at the hearing, and a copy of them was annexed to the report and made a part of it.

Among the by-laws were the following:

"Article Five.

"Committees.

"Sect. 3. A member having reported in writing to this Association of sickness or disability the President shall appoint a special committee of three members to investigate the sickness or disability of said member, which committee will report personally or in writing, at the next meeting, his condition, and so on at each succeeding meeting until said committee shall declare him fit for duty, at which time said member shall be taken off the sick list, and the committee discharged. Any member or members of such committee failing to comply with this article of the By-Laws shall be adjudged guilty of contempt."

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"Article Seven.

"Benefits.

"Section 1. Any member of this Association in good standing, being rendered incapable by sickness or disability, of following some occupation whereby he can gain a livelihood, shall be entitled to and shall receive out of the funds of this Association such weekly benefits as are hereinafter provided for, providing such sickness or disability does not proceed from immoral or improper conduct on his part.

"Sect. 2. A member being at the time sick or disabled and receiving benefits, cannot be debarred from receiving a continuation of such benefits because of his inability to pay his assessment. The President being authorized to deduct from the sums paid him for benefits such amounts as will keep him in good standing, which money so deducted is to be paid to the Financial Secretary and his receipt taken therefor.

"Sect. 3. The amount of weekly benefits payable by this Association shall be seven dollars: which said benefit shall commence at the expiration of one week from the date of such sickness or disability and continue until such member shall be declared fit for duty by the investigating committee. Such member shall receive the sum of seven dollars for each week he may be sick or disabled and the fractional part of seven dollars for each fractional part of such week's sickness or disability; provided, however, that no member shall receive benefits for a longer term than ten weeks in any consecutive twelve months. And in all cases this Association shall have and require unquestionable and satisfactory evidence that such member is entitled to benefits."

"Article Ten.

"Reinstatement.

"Section 1. Any member who may have been suspended according to Article 8, Sect. 2 (non-payment of dues), or Article 9, Sect. 2 (non-payment of death assessments), may make application for reinstatement, and said application must be accompanied by one dollar ($1.00) as a membership fee, and all moneys due the Association at time of suspension, also one month's dues

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in advance. All other rules governing a reinstated member are covered by Article 6, Sections 1 and 2. It is understood that the above applies also to members who have left the service of the Boston Elevated Railway Company, provided they make application to the Recording Secretary within thirty (30) days from date of suspension.

"Sect. 2. No member who has been suspended and afterwards reinstated shall be entitled to the benefits of this Association within one month after his reinstatement."

The case was argued at the bar in March, 1909, before *Knowlton*, C. J., *Hammond*, *Loring*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

C. Brewer, for the respondent.

F. R. Mullin, (*P. F. Spain* with him,) for the petitioner.

KNOWLTON, C. J. The petitioner asked for a writ of mandamus to compel the respondent to reinstate him as one of its members. He was suspended from membership by a vote of the association on June 4, 1908, for non-payment of an assessment of $1 regularly made. This was done without giving him any notice, or opportunity of being heard. It is a generally recognized doctrine of law that, under a by-law like that of this association, a member, who by reason of his membership has valuable pecuniary rights and interests in such an organization, cannot be removed without giving him notice and an opportunity to be heard. *Wachtel* v. *Noah Widows & Orphans' Benevolent Society*, 84 N. Y. 28. *Commonwealth* v. *Pennsylvania Beneficial Institution*, 2 S. & R. 141. *Sibley* v. *Carteret Club*, 11 Vroom, 295. *Delacy* v. *Neuse River Navigation Co.* 1 Hawks, 274, 279. *Fisher* v. *Keane*, 11 Ch. D. 353, 359. *Dean* v. *Bennett*, L. R. 6 Ch. 489. *The Queen* v. *Saddlers' Co.* 10 H. L. Cas. 404, 423.

In this particular the suspension was irregular and unauthorized. The assessment became due on May 14, and at that time the petitioner was disabled, and was receiving benefits, or should have been receiving benefits if the respondent had done its duty. Article Seven, Sect. 2 of the by-laws is as follows: "A member, being at the time sick or disabled and receiving benefits, cannot be debarred from receiving a continuation of such benefits because of his inability to pay his assessment. The

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President being authorized to deduct from the sums paid him for benefits such amounts as will keep him in good standing, which money so deducted is to be paid to the financial secretary and his receipt taken therefor."

It is found in the report that the petitioner was ill and unfit to work, by reason of general disability from consumption, from March 10, 1908, until after his suspension on June 4, 1908. A sick committee was appointed by the respondent in accordance with its by-laws, to investigate his sickness or disability. Upon their report, sick benefits were paid to him from March 17 to April 23, at the regular rate provided for such cases, less $1.50 deducted under Article Seven, Sect. 2, for a death assessment and for his monthly dues. Under Article Five, Sect. 3, he was entitled to receive his benefits until the committee declared him fit for duty, at which time he would be taken off the sick list. This, however, was subject to the limitation contained in Article Seven, Sect. 3, which makes his right for that year end at the expiration of ten weeks. The committee made no such declaration or report, and the respondent voted to drop his name from the sick list and to discontinue giving him sick benefits. This was done upon a statement from the financial secretary that the committee had been unable to find the petitioner at home. This action of the respondent was in violation of his legal rights.

The petitioner seems to have been ready to co-operate with the committee in arranging to meet them and to be where they could conveniently find him. If there was any fault on his part in this particular, it was not such as to justify the respondent's action in refusing to pay him sick benefits.

It does not appear that there was any change of residence or of post office address on the part of the petitioner, that had any connection with the action of the respondent, or with the petitioner's rights in this proceeding.

It is not contended by the respondent, and it could not be contended successfully, that this court should refuse the petitioner relief on the ground that he has failed to exhaust his remedies within the association. The by-laws of the association provide no remedy for a case like this. There is a provision in Article Ten for the reinstatement of a member who has been

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suspended; but that applies only to the case of one who admits that he was suspended rightly. To avail himself of it, he must assume the regularity of his suspension, and must pay a membership fee, and pay one month's dues in advance. Moreover, one reinstated under this article cannot have the right of a member to receive benefits until the expiration of a month from the time of his reinstatement.

There being no right of appeal or other remedy under the by-laws, a majority of the court are of opinion that the petitioner is entitled to relief from this court.

Peremptory writ of mandamus to issue.

CHARLES F. SMITH & another, executors & trustees, *vs.* GEORGE A. HAYNES & others.

Essex. May 17, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Devise and Legacy, Division by classes or by individuals. *Trust*, Power of trustee to sell real estate. *Words*, "Share and share alike," "Heirs," "Need."

The seventeenth clause of a will, each of the first fifteen clauses of which contained a legacy of a stated amount of money to a specified person, and the sixteenth clause of which devised the testator's homestead to a son of his nephew A., provided as follows: "I give and bequeath the Ballance of my real Estate and Personal Property to my Heirs as follows to the 8 Children of my Nephue A. 8 shares to the 8 children of my Niece F. 8 shares and my said Niece one Share and to" the son of a grandnephew one share "making 18 shares Share and Share alike." One of the eight children of the niece F., who was living when the will was made, died before the testator. *Held*, that it was manifest that the testator intended to dispose of all of his property, and that the clause quoted was intended as a residuary clause, that, although he used the words "share and share alike," he intended the division to be made by classes and not by individuals, and that the eight parts of the residue given to the children of F. should be divided among the seven living at the death of the testator.

By the sixteenth clause of his will, a testator devised his homestead to a grandnephew P. By the seventeenth clause he divided the residue into eighteen parts, of which seventeen parts were given by classes to P.'s brother and sister, to a niece F., and to her children, and to the children of a nephew, but $4,000 was deducted from P.'s share because of the devise of the homestead. The eighteenth clause read as follows: "I give that Said Four Thousand Dollars to the remaining 17 Heirs to be divided Equally among them." One of the

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children of the niece F. had died before the testator. *Held*, that the division of the $4,000 was to be among those named in the eighteenth clause, excepting P., in a single class, each receiving one sixteenth.

After clauses disposing of the residue of his estate among a niece and grandnephews and grandnieces, a testator provided as follows: "If at my Decease any of said Heirs are not 21—years of age I will that the Money going to them be invested by the trustees in good City Bonds or in some good Savings Banks and if said Heirs are not in need of the money it shall remain invested until they becom of age." The will nowhere specifically gave the trustees power to sell real estate. The residue was both real and personal estate. *Held*, that it was the intent of the testator that each beneficiary's share should be paid to him as he reached majority, that whether or not a beneficiary was "in need of money" at any time was to be determined by the trustees in the exercise of sound judgment and wise discretion in the light of all attendant conditions, and that by implication without express statement there was conferred upon the trustees a power of sale of real estate.

Where a will makes it the duty of the trustee thereunder to provide for the needs of certain beneficiaries, and the estate consists of both real and personal property, the trustee by necessary implication has power to sell real estate included in the trust to carry out its purposes.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Essex on November 6, 1908, seeking a construction of certain clauses of the will of Phineas Haynes, late of Haverhill, and for instructions in relation thereto.

The will contained nineteen clauses regarding the disposition of property. Each of the first fifteen made a legacy of a specified amount of money to a specified person. The sixteenth gave the testator's homestead estate to Phineas W. Haynes. The seventeenth, eighteenth and nineteenth clauses are quoted in the opinion.

The case was heard by *Knowlton*, C. J. He reserved it for determination by the full court.

The case was submitted on briefs.

W. S. Bartlett & J. J. Cavan, for the children of Arthur W. Haynes, deceased.

J. J. Ryan & R. C. Pingree, for Florence E. Fellows, an heir at law.

C. A. Holmes, guardian *ad litem*, for the children of Florence Fellows.

RUGG, J. This is a bill in equity by executors and trustees praying for instructions as to their duties under the will of Phineas Haynes.

1. The first question presented is as to the shares to which

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the children of Florence Fellows are entitled. This involves the construction of the following clause: "Seventeenth I give and bequeath the Ballance of my real Estate and Personal Property to my Heirs as follows to the 8 Children of my Nephue Arthur W. Haynes 8 shares to the 8 children of my Niece Florence Fellows 8 shares and my said Niece one Share and to George A. Haynes son of my Grand Nephue Allison Haynes one share making 18 shares Share and Share alike Excepting the Share of Phineas W. Haynes to whom I have given the Homestead in Section Sixteenth in this will to said Phineas W Haynes I give and Bequeath one full Share less Four Thousand Dollars." One of the eight children of Florence Fellows, living at the date of the will, predeceased the testator, leaving no children. If the legacy was given to the children as a class, on the death of one, the survivors take the whole, while if it was given to them as named individuals, then, on the decease of one, his share lapses, and being in the residuary clause with no gift over, becomes intestate estate. *Dresel* v. *King*, 198 Mass. 546. It is manifest from the will as a whole that the testator intended to dispose of all his estate and not to be in any respect intestate. Clause seventeenth has the characteristics of a true residuary clause, and discloses a purpose to include in it all estate not disposed of by the other clauses of the will. These children naturally form a class by reason of the relation to each other. They are grouped together by the testator under a common designation as the children of one mother, who was his niece. He describes them as a class and not as individuals. The children of one nephew are grouped by the testator in the same way, while the other beneficiaries in the residuary clause are named. Although the words "share and share alike" tend toward the other construction, they are not in any event conclusive, and do not overcome the general intent not to be intestate. They are applicable to the situation existent at the execution of the will, but are not controlling of a subsequent condition, where they conflict with the main purpose of the will. *Meserve* v. *Haak*, 191 Mass. 220. It follows that eight parts of the residuum are to be divided equally among the seven children of Florence Fellows who survived the testator. *Swallow* v. *Swallow*, 166 Mass. 241.

2. The next question is as to the disposition of the $4,000

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excepted from the share of Phineas W. Haynes in clause seventeenth and given by clause eighteenth, which is as follows: "I give that Said Four Thousand Dollars to the remaining 17 Heirs to be divided Equally among them." This language of the testator designates a single class, excluding from it Phineas W. Haynes, to whom he had made a specific devise of real estate by an earlier provision of the will. The description of this class as his "remaining 17 heirs" was not technically accurate, because the children of Florence Fellows were not his heirs, but he employs this word as indicating the objects of his benefactions in the three clauses under discussion. They were all his blood relations, and naturally lend themselves to the formation of a single class. This legacy is to be equally divided between the beneficiaries described in clause seventeenth, except that Phineas W. Haynes is not included. Each will receive one sixteenth.

3. Clause nineteenth provides that "If at my Decease any of said Heirs are not 21-years of age I will that the Money going to them be invested by the Trustees in good City Bonds or in some good Savings Banks and if said Heirs are not in need of the money it shall remain invested until they becom of age."

The intent expressed by this language is that the shares shall be paid to the children as they severally reach majority. There is nothing to indicate a design that the trustees shall hold the shares of all those who were minors at the death of the testator, until the youngest reaches the age of twenty-one years.

The further instruction under this clause is requested as to the circumstances under which the beneficiaries may be treated as "in need of the money" invested for them. The word "need" as here used imports something different from mere desire or the payment of a specific sum at a specified time, and therefore *Conant* v. *Stratton*, 107 Mass. 474, is not in point. The main purpose is to preserve the legacies until the beneficiaries severally attain majority. But as a concession to the possible inability of parents or guardians to provide the physical, educational or moral environment suited to their birth and prospects as the recipients at the age of twenty-one of bounty from the testator, he provides as incidental to the chief consideration that they shall not lack conditions, which would be in keeping with their position in society, in order that on be-

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coming of age they might become useful citizens. So far as the amount of the fund permits, they should be decently clothed, properly educated, and be placed under virtuous influences. Perhaps they may be expected, when of sufficient age, to work toward their own support and thus be trained to industry and economy. Their circumstances are not disclosed with definiteness on the record nor is the amount of their shares stated. Hence it is not possible and perhaps not necessary more explicitly to determine their needs than to say that advancements may be made from time to time as a sound judgment and wise discretion may dictate.

The will appoints trustees. The only mention of them aside from the provision for their appointment and succession and the only occasion for their service is in clause nineteenth. There is no indication of an intent that the needs of the minors for advancement should be decided by any one except the trustees, while it is in harmony with the general benevolent design of the testator that the trustees pass upon that question. The careful conservation of the residuum of the estate provided by the will might be frustrated if this decision was left to others. It follows that the trustees are to determine what are the needs of the several minors for advancements.

The final request for instruction is whether the trustees have power to sell real estate. The residuum of the estate consists of both real and personal estate. The will gives no express power to sell the real estate. But it confers upon the trustees an active duty to provide for the needs of certain beneficiaries. It is conceivable that sickness or distress might require the entire share of some of the minors to relieve their needs before the time for final payment arrives. It follows that by implication without express statement there is conferred upon the trustees a power of sale of the real estate. *May* v. *Brewster*, 187 Mass. 524. *McLaughlin* v. *Greene*, 198 Mass. 158.

Decree accordingly.

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ANGELA E. ROBERTS CASE.

Suffolk. May 17, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Feeble Minded Person. Notice. Overseers of the Poor.

A notice in writing, by one applying to a judge of probate for the commitment of a feeble minded person to the Massachusetts School for the Feeble-Minded in accordance with R. L. c. 87, §§ 118, 119, which is addressed "Overseer of the Poor" of the town where the alleged feeble minded person resides, and which is sent by mail and placed in a post office box where mail for the overseers of the poor of that town is put, whence it is taken by one of the overseers, who acknowledges such receipt without the knowledge of his associates, is sufficient notice to satisfy the requirements of § 119.

If the notice in writing, which is required by R. L. c. 87, § 119, to be given, by one applying for the commitment of a feeble minded person to the Massachusetts School for the Feeble-Minded, to the overseers of the town where such feeble minded person resides, is given to one member of that board, it is sufficient.

KNOWLTON, C. J. This is a writ of *habeas corpus* on which the return shows that the person alleged to be imprisoned and restrained of her liberty is an inmate of the Massachusetts School for the Feeble-Minded, held by the superintendent of the school under a commitment by the judge of probate for the county of Worcester. No question is made in regard to the form of the report to this court, and we treat the report as presenting all questions of law that appear on the record and the findings of the single justice.*

The commitment was made under the R. L. c. 87, §§ 118, 119. The petitioner for the writ contends that the commitment was irregular and void, and the detention illegal, because of a failure to give notice of the original proceeding to the overseers of the poor of the town of Attleborough, where the alleged feeble minded person resided, and a failure to give evidence of such notice to the judge who made the commitment. This is the only matter argued by the petitioner, and the only ground on which he contends that the prisoner should be discharged from the school.

* *Morton*, J., who reported the case "for determination by the full court such order to be entered as law and justice may require."

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Section 119 of the statute provides that a person who intends to apply for the commitment of a feeble minded person "shall first give notice in writing to the overseers of the poor of the city or town in which such feeble-minded person resides, of such intention. . . . Satisfactory evidence that such notice has been given shall be produced to the judge and shall accompany the order of commitment."

In this case the applicant sent a letter addressed, "Overseer of the Poor, Attleboro, Mass.," giving notice in writing of her intention to apply for the commitment of Angela Esther Roberts to the school for the feeble minded. In reply to the notice the applicant received the following letter:

"Office of the Overseers of the Poor,
"Attleboro, Mass., Dec. 16, 1902.

"Elizabeth C. Putnam,
"Madam,

"A document containing your signature, also one signed by Mary W. Dewson, giving reasons why 'Angela Esther Roberts' should be 'committed to the Mass. School for Feeble Minded' has been received at this office. We most respectfully decline signing the above mentioned document until we can get more definite information in regard to the parents of the said 'Angela Esther Roberts' than 'that the parents lived in Attleboro.'

"Very respectfully,
"G. B. Fittz, Visitor,
"For the Overseers of the Poor."

Fittz was one of the overseers of the poor and was the visitor for the board. In reply to this letter another letter was written to him, giving him further information and an identification of the parents of the girl. Afterwards he sent a return and certificate upon the commitment paper, as follows:

"January 6, 1903.

"I, the subscriber, overseer of the poor of the town of Attleboro where Esther A. Roberts resides, hereby certify that I have been notified in writing of the intention of Elizabeth C. Putnam to apply for the commitment of her friend, the said Esther A. Roberts to the Massachusetts School for the Feeble-Minded.

"George B. Fittz."

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He had no authority to act in any matter pertaining to the overseers of the poor before bringing the subject to the attention of the other members of the board, and in this matter he acted without the knowledge of his associates. The mail for the overseers of the poor was put in a box in the local post office, to which he had a key.

The notice in writing was perfect in form, except that it was addressed to the "overseer of the poor," instead of the "overseers of the poor." We think this irregularity was immaterial. The substance of the notice showed that it was for the overseers as a board, and the address showed that it was for every member, as well as for any one member. It was received by a member of the board who evidently obtained it from the post office by virtue of his official authority. The purpose of the notice is, particularly, to bring the facts to the knowledge of the board that represents the town in the matter of support of paupers, in reference to the liability of the town for charges in the school, on account of those who have settlements in the town. It comes within the class of notices in which it has been held that, if the notice is given to one member of the board, it is sufficient. *Walpole* v. *Hopkinton*, 4 Pick. 357. *Dalton* v. *Hinsdale*, 6 Mass. 501. *Oakham* v. *Sutton*, 13 Met. 192, 197. *Greene* v. *Taunton*, 1 Greenl. 228. *Gorham* v. *Calais*, 4 Greenl. 475. It is different from a demand upon the county commissioners for official action, neglect of which is visited with a penalty, which was the subject of the decision in *Ilsley* v. *Essex County*, 7 Gray, 465. Where the purpose of a notice is merely to give information to an official board representing a town, in reference to a possible pecuniary liability, it would be unreasonable to hold that the person giving the information must give it personally to every individual member of the board, or that in a matter of this kind he should be obliged to wait until there is a formal meeting of the board. We are of opinion that the notice and the evidence of giving it, produced to the judge, were all that the law requires. The question of the constitutionality of the statute and other questions suggested at the hearing before the single justice have not been argued by the petitioner, and we need not consider them. See *Dowdell, petitioner*, 169 Mass. 387, 389.

Prisoner remanded.

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The case was submitted on briefs.

P. E. Brady, for the petitioner.

D. Malone, Attorney General, & *A. Marshall*, Assistant Attorney General, for the Massachusetts School for the Feeble-Minded.

JAMES B. SWEENEY *vs.* SELECTMEN OF NATICK & another.

Suffolk. May 17, 1909. — June 22, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & SHELDON, JJ.

Natick. Municipal Corporations, Town meeting. *Police. Civil Service. Words*, "Annual town meeting," "Official ballot."

St. 1900, c. 133, providing for an extension to the police and fire forces of the town of Natick of the provisions of the civil service law upon the acceptance of the act by the town "at an annual town meeting or at any town meeting duly called for the purpose," was not accepted at an election on March 1, 1909, although a majority of the voters then voted in favor of its acceptance, since the vote was by precincts under St. 1907, c. 560, § 881, which duly had been accepted by the town and which provides that voting by precincts may be established for the election of town officers and for voting on the question of granting licenses for the sale of intoxicating liquors, but that other questions shall be in order only at the town meeting.

The words "official ballot" in St. 1900, c. 133, § 4, with regard to the acceptance by the town of Natick of the provisions of that chapter, mean "a ballot prepared for any election, caucus or primary by public authority and at public expense."

PETITION, filed on March 19, 1909, alleging that the respondents, the members of the board of selectmen of Natick, illegally had removed the petitioner from his office as a member of the police force, and praying for a writ of mandamus commanding them to reinstate him.

The case was heard by *Morton*, J. The facts are stated in the opinion. The single justice dismissed the petition and reported the case for determination by the full court.

The case was submitted on briefs.

M. F. Kennedy & *A. W. Putnam*, for the petitioner.

W. R. Bigelow, for the respondents.

SHELDON, J. The decision of this case depends wholly on the question whether St. 1900, c. 133, was in force in the town of

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Natick on March 12, 1909, when the respondents, the selectmen of that town, removed the petitioner from his position upon its police force. If it was then in force, his removal was unlawful and invalid. *Logan* v. *Mayor & Aldermen of Lawrence*, 201 Mass. 506. If it was not then in force the respondents had the right to remove him from his position. The St. of 1906, c. 210, § 1, amended by St. 1907, c. 272, applies only to members of the police force in cities and to members of the district police, and does not protect the petitioner.

It was provided by § 4 of St. 1900, c. 133, as follows: "This act shall take effect upon its acceptance by a majority of the legal voters of said town present and voting thereon at an annual town meeting or at any town meeting duly called for the purpose. If the vote thereon is taken at an annual town meeting it shall be by official ballot in answer to the question, 'Shall an act passed by the General Court in the year nineteen hundred, to extend the civil service law to the police and fire forces of Natick, be accepted?'" The only acceptance of this act by the legal voters of Natick was on March 1, 1909, when the vote was taken by precincts, under R. L. c. 11, § 353, now embodied in St. 1907, c. 560, § 381, the provisions of which had been accepted by the town of Natick on March 22, 1906. But by that act it was only voting for the election of town officers and upon the question of granting licenses for the sale of intoxicating liquors that was authorized to be done by precincts, and all other matters were to be in order only at a town meeting to be held within a time there specified. Accordingly it was held by this court that under similar provisions in St. 1898, c. 548, § 349, afterwards codified into R. L. c. 11, § 353, and now contained in St. 1907, c. 560, § 381, the St. of 1901, c. 78, for the extension of the provisions of the civil service law to the police and fire forces of towns that should accept that act, could not be accepted by a town by precinct voting. *Ray* v. *DeButts*, 180 Mass. 155. In our opinion, that case is decisive upon the question before us. The provision in St. 1900, c. 133, § 4, that the vote shall be by official ballot, does not warrant the inference that the vote could be taken by precincts. The "official ballot" seems to have been first provided for in our statutes by the St. of 1888, c. 436. It meant alike in 1900, when the act before us was

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passed, in 1906, when the town of Natick accepted the act for precinct voting, and in March, 1909, when the town attempted to accept the act of 1900, as it still means, "a ballot prepared for any election, caucus or primary by public authority and at public expense." St. 1898, c. 548, § 1. R. L. c. 11, § 1. St. 1907, c. 560, § 1.

We are obliged to conclude that there has been no valid acceptance by the legal voters of the town of Natick of St. 1900, c. 133. It follows that this petition cannot be maintained.

Petition dismissed.

ABBIE T. WIGHT *vs.* WALTER W. SHAW, administrator.

SAME *vs.* SAME.

Norfolk. March 12, 1909.—June 23, 1909.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Executor and Administrator, Petition for leave to bring suit on bond, Accounts. *Bond*, Technical breach. *Probate Court. Appeal.*

Leave to bring suit against an administrator on his official bond may be refused where a single justice who hears the petition on appeal from a decree of the Probate Court finds on evidence warranting the finding that there was no evidence that there had been "any breach of the bond which has brought any damage to the estate, and I do not know that there has been a technical breach. Possibly there has been. . . . There is no such breach of his bond as would justify the Probate Court in ordering an action to be commenced upon it."

Where, on an appeal from a decree of the Probate Court reforming and then allowing in amended form accounts of an administrator, a single justice of this court after hearing evidence makes findings showing that there is no basis of fact for the objection of the appellant, and his findings are well warranted by the evidence, which is reported in full, this court will not reverse such findings.

APPEAL from a decree of the Probate Court of the county of Norfolk dismissing a petition for leave to sue the administrator of the estate of Nathan Crane, late of Canton, upon his official bond; also an

APPEAL from a decree of the same court reforming and then allowing the first and second accounts of that administrator.

The objections to the decree, filed with the first appeal, were as follows:

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"1. Said administrator has not rendered a true account of his administration though cited by the court.

"2. Said administrator has not faithfully administered said estate according to law.

"3. Said administrator has unreasonably delayed the settlement of his account and the distribution of said estate."

The objections filed with the second appeal were as follows:

"1. Said court wrongly credited said administrator with the payment to Lizzie S. Barnes of the amounts stated in [certain items of the accounts] . . . — to wit, the sum of $3,409.82 alleged to have been paid to her in addition to the amount of a judgment for $632.18 recovered by her on December 7, 1903, in an action against said administrator.

"2. Said court wrongly found that a certain mortgage assigned by John H. Davis for $507.80 to said Nathan Crane on the 10th day of November, A. D. 1897, and recorded . . . is of no value. . . .

"3. Said court wrongly failed to charge said administrator with the face value and interest of a certain mortgage for $2,000 given by said Walter W. Shaw to said Nathan Crane, dated June 16, 1897, and recorded . . . and said court wrongly failed to charge said administrator with said face value and interest as assets of the estate in his hands.

"4. Said court wrongly credited said administrator with the payment to Lizzie S. Barnes of the sum of $632.18, being the amount of the judgment recovered by her on December 7, 1903, in a suit brought by said Barnes against said administrator. . . ."

The items of payments to Lizzie S. Barnes, referred to in the first objection filed in the second case, were twelve in number, five of them being made between March and November, 1900, five between January and June, 1901, one of them in March and one in May, 1902. The respondent was appointed administrator on March 7, 1900.

The appeals were heard by *Loring*, J. A commissioner was appointed to take the testimony. The justice filed the following memorandum of findings:

"I find in this case that the administrator has been honest in the administration of this estate, and that he exercised due care in realizing the assets thereof.

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"I find that he exercised due care in defending the action which was brought against the estate by Mrs. Barnes, and I find as a fact that the verdict of the jury in that case established the fact that the $3,409.82 which he had previously paid to her was justly due to her.

"I find that the jury also found that in addition to the $3,409.82, there was due to her a further sum, which amounted to $632.18 when he paid it.

"In defending that action I find that he exercised due care, and those two sums should be allowed to him.

"I find that he also exercised due care in ascertaining whether the mortgage on the land in China, in Maine, [the 'Davis mortgage' mentioned in the opinion and in the second objection in the second case] was a valid mortgage; that he was advised that it was not, and that he properly under those circumstances did not push the matter further and put the estate to expense in a matter in which he could recover nothing, and therefore I find that he was properly allowed the $507, the amount of the China mortgage, as a loss.

"I find as a fact that he paid the $2,000 note before the death of the intestate, and that therefore he should not be charged with the amount of that mortgage note.

"I therefore affirm the first decree [the second decree appealed from] which was appealed from.

"So far as the second decree [the first decree appealed from] is concerned, there has been no evidence before me that there has been any breach of the bond which has brought any damage to the estate, and I do not know that there has been a technical breach. Possibly there has been. This argument that he should account for interest on sums because there has been a delay, whether it is in part due to him or not, is not enough to put in suit his bond, and I find that there is no such breach of his bond as would justify the Probate Court in ordering an action to be commenced upon it."

H. M. Dean, (*H. M. Dean, Jr.*, with him,) for the appellant.

T. E. Grover, for the administrator.

SHELDON, J. 1. The first of these cases comes before us upon an appeal from a decree of the Probate Court dismissing the appellant's petition for leave to sue the respondent upon his offi-

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cial bond as administrator of the estate of Nathan Crane. At the hearing before a single justice of this court, he found no evidence of any breach of the bond which had brought any damage to the estate, and did not find that there had been even a technical breach. He ruled that the bond ought not to be put in suit merely on the ground that the administrator should account for interest because there had been delay, whether that delay was due to him or not; and found affirmatively that there was no such breach of the bond as would justify the Probate Court in ordering suit brought upon it. In our opinion these findings were well warranted by the evidence, and we could not reverse them unless they were plainly wrong. *Lindsey* v. *Bird*, 193 Mass. 200. *Regester's Sons Co.* v. *Reed*, 185 Mass. 226. Plainly upon these findings leave to bring suit upon the bond ought not to be granted. As to the first reason assigned in the petition, it is enough to say that the administrator does not contest the correctness of his account as reformed by the Probate Court; and that account, so reformed, appears to be a true account. The second and third reasons likewise are not supported by the facts in evidence.

2. The second case is an appeal from the allowance by the Probate Court of the administrator's accounts as reformed by that court. Neither one of the four specific objections made by the appellant to these accounts has been maintained by the evidence. The final payment to Mrs. Barnes was made in good faith after her claims had been established by litigation which the administrator exercised due care in defending. The amount due on the Davis mortgage, it was found, was properly allowed as a loss. The mortgage note which had been due from the administrator to the intestate was shown to have been paid to the intestate in his lifetime, and accordingly the administrator should not be charged with the amount thereof.

In each case the order must be

Decree affirmed.

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FREDERICK D. ELY & others, trustees, *vs.* ATTORNEY GENERAL & others.

Norfolk. May 17, 1909. — June 23, 1909.

Present: KNOWLTON, C. J., MORTON, BRALEY, SHELDON, & RUGG, JJ.

Charity, General charitable purpose, Administration *cy pres*.

The will of a testatrix contained the following residuary clause: "The residue of my estate, real and personal, I give, bequeath and devise, for the purpose of founding a Kindergarten Home for Deaf Children, to be located on the old estate owned by me — to be founded strictly on the family system, the object being to prepare a limited number of young children to enter under favorable circumstances, those institutions where the deaf are taught to speak by lip movements." The "old estate" referred to was the place in the town of Wellesley in which the testatrix had lived all her life. After her death the main part of the house was injured by fire so as to be uninhabitable, and it would cost $4,000 or $5,000, if not more, to make it fit for occupancy as a kindergarten for deaf children. Besides the "old estate," the residue left to the trust amounted to about $20,000, and, after such an expenditure as would be necessary to put the estate in a proper condition for use, the balance in the hands of the trustees would not be enough to maintain the institution for any considerable length of time. Upon a bill for instructions filed by the trustees under the will, a single justice found that it was "altogether problematical and uncertain how much money would be required and how long it would take to accumulate the necessary funds." The single justice also found that the Sarah Fuller Home for Little Deaf Children was situated in West Medford, about fourteen or fifteen miles from Wellesley; that it had been established about twenty years and that its objects and principles were the same in all respects as those which the testatrix had in mind in founding a Kindergarten Home on her estate in Wellesley; that it took a limited number of children and adopted the family system. He found also that the testatrix was familiar with and interested in its work and that her purpose in founding a Kindergarten Home on her estate was to have the same sort of work done there as was done in the institution at West Medford. The executive committee of the Sarah Fuller Home had expressed by vote a willingness to take over the fund in the hands of the petitioning trustees and the proceeds of the real estate that might be sold, and to administer in connection with the Home the charity created by the testatrix. The Sarah Fuller Home was the only institution of the kind in the Commonwealth. *Held*, that the trustees should not be instructed to hold the fund for accumulation; that, since the founding of a new home was impracticable for lack of money to maintain it, it was within the general intent of the testatrix to apply the gift to the support and maintenance of such children in another home, furnishing the same advantages, in a place so near as to accommodate the same class of persons, and it was ordered that

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the charity should be administered in accordance with the doctrine of *cy pres*, through the Sarah Fuller Home, under a scheme to be approved by a single justice.

KNOWLTON, C. J. This is a bill for instructions,* by trustees appointed under the will of Charlotte Kingsbury, late of Wellesley, deceased. The questions arise under the residuary clause of her will, which is as follows: "The residue of my estate, real and personal, I give, bequeath and devise for the purpose of founding a Kindergarten Home for Deaf Children, to be located on the old estate owned by me,—to be founded strictly on the family system, the object being to prepare a limited number of young children to enter under favorable circumstances, those institutions where the deaf are taught to speak by lip movements." The "old estate" referred to is the place in which she resided all her life. The single justice has found that, so far as the question is one of fact, "it is not at present practicable to locate on the old estate the Kindergarten Home for Deaf Children which the testatrix desired to found there." This is because of the insufficiency of the property provided for the purpose. Through injury to the house by fire, since the death of the testatrix, the main part of it has become uninhabitable, and it would cost $4,000 or $5,000, if not more, to make it fit for occupancy as a kindergarten home for deaf children. Besides the old estate itself, the trustees have property amounting only to $20,138.15, applicable to this charitable use. After such expenditure as would be necessary to put the estate in a proper condition for use, the balance in the hands of the trustees would not be enough to maintain the institution for any considerable time.

The first question upon which there can be any doubt is whether, with a view to carry out the purpose of the testatrix as nearly as possible, the property should be held by the trustees and allowed to accumulate until it is sufficient to justify the founding of the home. The justice found that "it is altogether problematical and uncertain how much money would be required and how long it would take to accumulate the necessary funds." Upon this finding, taken in connection with the other

* Filed in the Supreme Judicial Court on September 6, 1907. The case was heard by *Morton*, J., who, with the consent of the parties, reported it for determination by the full court.

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facts disclosed, we are of opinion that the trustees should not be instructed to hold the fund for accumulation, in the hope that some time, in the more or less distant future, they would be able to carry out literally the purpose of the testatrix, which evidently was intended to be executed in a short time after her death.

The heirs at law contend that the charity has failed altogether, and that the property should pass to them as the legal representatives of the testatrix. The question thus raised is whether she had a general charitable intention to aid a particular class of unfortunate persons in a home of the kind referred to, or whether her only purpose was to found and maintain a new home for deaf children on her old estate. Looking at the language of the will, it seems to have been her purpose to provide for these children the advantages of a home of the kind referred to, and that this intention was paramount in her thought. As was held in *Weeks* v. *Hobson*, 150 Mass. 377, the exact location provided for in the will does not seem to have been so important a consideration in her thought as the existence and maintenance of a conveniently located home. Nor is the class to be benefited limited to children residing in her own town or neighborhood. The number of persons needing the advantages of such a home is so small that she naturally would expect its inmates to come from a considerably large territory. Since the founding of a new home is impracticable for lack of money to maintain it, we think it is within her general intent to apply the gift to the support and maintenance of such children in another home, furnishing the same advantages, in a place so near as to accommodate the same class of persons. The finding of the single justice in regard to another institution, in which the testatrix was interested, is important in its bearing upon her general purpose in reference to conditions now existing, when the principal scheme which she had in mind is impossible of execution. This finding is as follows: "The Sarah Fuller Home for Little Deaf Children is located in West Medford, which is about fourteen or fifteen miles from Wellesley. It has been established about twenty years, and its objects and principles are the same in all respects as those which the testatrix had in mind in founding a kindergarten home on her estate in Wellesley. It takes a limited number of children and adopts

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the family system. The testatrix was familiar with and interested in its work. I find that her purpose in founding a kindergarten home on her estate was to have the same sort of work done there as was done in the institution at West Medford. Beyond carrying out the wish of the testatrix, no particular advantage would be gained by having the home located in Wellesley instead of having the charity administered by the Sarah Fuller Home in West Medford. The children in the Sarah Fuller Home come from surrounding towns, and in some cases from other States, and that would be the case if the home contemplated by the testatrix in Wellesley was established. The executive committee of the Sarah Fuller Home have by vote expressed a willingness to take over the fund in the hands of the petitioning trustees and the proceeds of the real estate that may be sold, and to administer in connection with the home the charity created by the testatrix. The Sarah Fuller Home is the only institution of the kind in this Commonwealth, and I am of opinion, and so find, that if the doctrine of *cy pres* is to be applied a scheme for administering the charity through the Sarah Fuller Home should be approved." We are of opinion that the case comes within the doctrine stated and applied in *Weeks* v. *Hobson*, *ubi supra*, *Codman* v. *Brigham*, 187 Mass. 309, 313, *Darcy* v. *Kelley*, 153 Mass. 433, *Attorney General* v. *Briggs*, 164 Mass. 561, *Sherman* v. *Congregational Home Missionary Society*, 176 Mass. 349, *Amory* v. *Attorney General*, 179 Mass. 89, *Boston* v. *Doyle*, 184 Mass. 373, *Osgood* v. *Rogers*, 186 Mass. 238, and *Richardson* v. *Mullery*, 200 Mass. 247.

It is to be distinguished from *Stratton* v. *Physio-Medical College*, 149 Mass. 505, *Bullard* v. *Shirley*, 153 Mass. 559, *Teele* v. *Bishop of Derry*, 168 Mass. 341, *Gill* v. *Attorney General*, 197 Mass. 232, and *Bowden* v. *Brown*, 200 Mass. 269.

The charity is to be administered in accordance with the doctrine of *cy pres*, through the Sarah Fuller Home, under a scheme to be approved by a single justice.

So ordered.

The case was submitted on briefs.

D. Malone, Attorney General, & *F. T. Field*, Assistant Attorney General, for the Attorney General.

W. F. Connor, for Martha J. Lovewell.

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HOLLIS R. BAILEY, trustee, *vs.* CAROLINE A. WOOD & another.

Suffolk. December 7, 1908. — June 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Insurance, Life. *Husband and Wife. Bankruptcy. Constitutional Law. Limitations, Statute of.*

St. 1894, c. 522, § 73, re-enacted in substance in R. L. c. 118, § 73, contains the following provision: "Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of this section relating to premiums paid in fraud of creditors." *Held*, that this statute applies to and includes an assignment by a husband to his wife of a paid up endowment life insurance policy, and that such an assignment, made when the assignor is deeply insolvent and is known to be so both by himself and his wife and followed by the bankruptcy of the assignor, is good against the trustee in bankruptcy of his estate by virtue of the statute, although the facts may be such that except for the statute the assignment would be in fraud of his creditors.

The provision of St. 1894, c. 522, § 73, re-enacted in substance in R. L. c. 118, § 73, by which, as interpreted by this court, an assignment of a paid up endowment life insurance policy by a husband to his wife, made when the husband is deeply insolvent, and which except for the statute would have been in fraud of creditors, is good against the trustee in bankruptcy of the husband's estate, is not unconstitutional as creating an unreasonable exemption of property unlimited in amount.

The question, whether an allegation in a declaration that the defendant "concealed the cause of action" can be treated, on demurrer, as an allegation that the defendant fraudulently concealed the cause of action within the meaning of R. L. c. 202, § 11, so that the statute of limitations did not begin to run until the discovery of the cause of action, here was suggested but not considered.

MORTON, J. This is a bill in equity by the trustee in bankruptcy of one James A. Wood to recover the proceeds of a paid up endowment life insurance policy on the life of Wood alleged to have been transferred by him in fraud of his creditors to his wife, the defendant Caroline A. Wood, in December, 1901. The policy matured, as alleged, in April, 1904, and upon maturity the insurance company paid over the amount due thereon, $20,000,

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to the defendant Caroline A. Wood. The bill as originally drawn and filed was demurred to, and the demurrer was sustained. Thereupon the bill was amended, and was again demurred to. This demurrer was also sustained, and, the plaintiff apparently not desiring to amend further, a decree was entered dismissing the bill with costs.* The plaintiff appealed.

The sole question is whether a paid up endowment life insurance policy, taken out by the husband and transferred by him to his wife by a voluntary assignment, comes within the provisions of St. 1894, c. 522, § 73, now R. L. c. 118, § 73. The plaintiff contends in effect that the statute applies only to the ordinary case of a life insurance policy where the premium is to be paid from year to year, and does not apply to a case like that before us, or, if it does, that it is unconstitutional and void.

The statute provides that "every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of this section relating to premiums paid in fraud of creditors." St. 1894, c. 522, § 73. R. L. c. 118, § 73. The provisions "relating to premiums paid in fraud of creditors" follow a provision that, when a policy of insurance has been effected by a person on his own life or that of another in favor of some other person than himself having an insurable interest therein, the beneficiary shall be entitled to the proceeds as against creditors and representatives of the person affecting the same, and may maintain an action thereon in his own name, "Provided, [and these are the provisions referred to] that, subject to the statute of limitation, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy."

The statute, it will be observed, does not undertake to exempt from its operation paid up endowment policies, or to confine its

* This decree was made in the Superior Court by *Fox*, J.

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application to the ordinary life insurance policy, and we see nothing either in the history of the legislation relating to the matter, or in the policy of the law to warrant such a construction. The St. of 1894, c. 522, § 73, was a re-enactment without material changes of former statutes and was itself re-enacted in substance in R. L. c. 118, § 73; St. 1844, c. 82; St. 1854, c. 453, § 28; St. 1856, c. 252, § 42; Gen. Sts. c. 58, § 62; St. 1864, c. 197; Pub. Sts. c. 119, § 167; St. 1894, c. 120. In the codification of the insurance laws in St. 1887, c. 214, the provisions which had previously existed in regard to married women were omitted, probably for the reason that they were deemed unnecessary. They were, however, re-enacted in St. 1894, c. 120, and have been in force ever since. Any argument, therefore, in regard to a change of legislative policy which might have been drawn from their omission from the statute of 1887, if the matter had stopped there, is more than met by their re-enactment in 1894 and subsequent retention upon the statute book. Whether the statute as we construe it is a good statute or a bad statute in respect to the opportunities which, as the plaintiff contends, it offers for fraud is a matter for legislative consideration. Since 1844, with the exception of the seven years from 1887 to 1894, if they can be called an exception, it has been the policy of the Commonwealth to enable the husband and father to provide by insurance on his life for his wife and children, subject only to have premiums paid in fraud of creditors within the statutory period of limitation inure to their benefit out of the proceeds of the insurance, and since 1894 the law has included assignments from the husband to the wife of policies issued to the husband. This has been regarded as a wise and humane policy and the constitutionality of the legislation has never been questioned, and we do not see how it can be successfully. "It proceeds," as has been said, "upon the theory that the interest of a man's wife and children in his life, and his duty to make reasonable provision for their support, are not wholly subordinate to the claims of his creditors; and that he may make an irrevocable settlement of a policy of insurance on his life for the benefit of his family." *Gould* v. *Emerson*, 99 Mass. 154. See also *Central Bank of Washington* v. *Hume*, 128 U. S. 195. The interests of creditors are protected by the provision that subject to the statute of limi-

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tations premiums paid in fraud of their rights shall inure to their benefit from the proceeds of the policy. They were similarly protected in the beginning. See St. 1844, c. 82. Strictly speaking, only to the extent to which funds have been withdrawn from his estate by the debtor for the payment of premiums, can it be said that the insurance on his life has operated to the prejudice of his creditors. His life constitutes no part of the assets of his estate and nothing therefore is taken from his creditors by an insurance upon it in favor of his wife or the assignment to her of a policy of insurance already issued, though it may be true, as contended by the plaintiff, that, except for the statutory exemption in her favor, the policy like any other contract entered into by him and inuring to his benefit would constitute or could be found to constitute a part of the assets of her husband's estate. We assume in favor of the plaintiff, without deciding, that in view of the alleged deeply insolvent condition of the bankrupt at the time of the assignment of the policy by him to his wife the transfer could be found to have been in fraud of his creditors and that she would be accountable for the proceeds except for the statute. But we think that the statute applies, and that she is not accountable for the proceeds of the policy except to an amount equal to such premiums, if any, as have been paid in fraud of creditors.

The plaintiff concedes that the question of the construction of the statute and the validity of the exemption is one of State and not of federal law, and that the bankruptcy act recognizes the exemptions established by the several States. *Holden* v. *Stratton*, 198 U. S. 202. But he contends that the exemption being unlimited in amount is unreasonable and that the statute is, therefore, unconstitutional. If a man's life were property which his creditors could seize, there might, perhaps, be something in the contention. But, as already observed, the statute provides, in effect, that so much of the insurance as consists of property of the debtor which he has put into it by way of premiums in fraud of his creditors shall inure to them. Subject to this there can be nothing unreasonable in providing that one may insure his life to any amount that he chooses for the benefit of his wife and children, or that he may assign to his wife policies already issued to him. Various statutes have been enacted in which

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this principle has been carried further than the statute under consideration carries it. Thus, R. L. c. 125, §§ 17, 18, 19, provides that the employees of a railroad, street railway or steamboat corporation may form themselves into a corporation to receive, manage and apply property and funds for the benefit of members and their families, and that the same shall not be liable to attachment or to be taken on execution for the debts or liabilities of the members. The same provision is made in regard to assessment insurance so called (R. L. c. 120, § 18) and the money or other benefit to be paid to the certificate holder or beneficiary in the case of a fraternal beneficiary corporation. R. L. c. 119, § 17. In all these cases the exemption is absolute and unlimited, and it was held in *Geer* v. *Horton*, 159 Mass. 259, in regard to the statute last cited, that the exemption was constitutional. In *Holden* v. *Stratton*, 198 U. S. 202, it was held, so far as the Supreme Court of the United States could hold, that a law of Washington providing that "the proceeds or avails of all life insurance shall be exempt from all liability for any debt" was constitutional, on the ground, in effect, that it was within "the general power of the Legislature to determine the amount and character of property which should be exempt." Without undertaking to determine whether there are any limits to the exercise of this legislative power, and, if there are any, what they are, it is enough to say that, if there are any, it is plain, we think, that they have not been exceeded in the statute before us.

The conclusion to which we have come on the main question renders it unnecessary to consider whether upon the facts alleged in the amended bill the statute of limitations would operate as a bar, though it is to be observed that the bill nowhere alleges that the defendant Caroline A. Wood fraudulently concealed the cause of action, but only that she "concealed the cause of action." See *Leslie* v. *Jaquith*, 201 Mass. 242.

Decree affirmed with costs of appeal.

A. Whiteside & A. L. Millan, (*H. R. Bailey* with them,) for the plaintiff.

G. W. Anderson, for Caroline A. Wood.

H. P. Tilden, for the Puritan Trust Company, submitted a brief.

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EMERY LANOUE *vs.* CLARENCE H. NELSON.

Middlesex. January 15, 18, 1909. — June 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Negligence, Employer's liability.

In an action by a carpenter, under the employers' liability act, for personal injuries alleged to have been caused by the negligence of the foreman of the defendant, entrusted with and exercising superintendence, in causing a derrick used in putting a heavy beam in place to be set in an improper position with reference to the beam, by reason of which the end of the beam knocked the plaintiff off a wooden horse on which he was standing for the purpose of steadying the beam while it was being put in place, it appeared that the plaintiff was a carpenter of eighteen years' experience, during seven of which he had been in the employ of the defendant, and that for the four or five weeks immediately preceding his injury he had been at work on the same kind of work on which he was engaged when he was hurt. He was admitted to have been a competent and experienced workman. The work was comparatively simple in its nature, the beams were not large, and he knew that they were likely to swing. It was his duty to guide one end of the beams into place. He knew thoroughly the position of the derrick and its relation to the place where the beam was to be put. He had placed the wooden horse on which he was standing between the derrick and the end of the beam by direction of the foreman. He testified, on cross-examination, that it would have been a safer position for him if the horse had been on the other side of the column, on the top of which his end of the beam was to rest, instead of being between that column and the derrick, and that, if the horse had been in such other position, the beam, if it swung, would not have struck him. He also said that "he knew that as the timber swings, things are likely to be hit; and that he stood upon the horse for the purpose of steadying the timber," that "he knew that the timber was to be hoisted and went up there for the purpose of guiding the timber and help steady the column, and that it was while he was attempting to do this that the timber pushed him from the horse." *Held*, that, assuming that the derrick was placed improperly, there was no evidence of negligence or of failure of duty on the part of the superintendent toward the plaintiff; that no warning from the superintendent would have given the plaintiff any information which he did not have already, and that the superintendent had no reason to suppose that, so far as respected a man of the experience and capacity of the plaintiff, there was any occasion to change the position of the derrick or to give him any warning as to his conduct.

TORT for personal injuries sustained while in the employ of the defendant. Writ dated March 10, 1908.

The declaration alleged that the plaintiff on or about June 18, 1907, was employed by the defendant as a carpenter upon a certain brick building in process of erection by the Appleton Com-

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pany over Robeson Street, so called, in Lowell, and was working under one Coram, who was employed by the defendant as foreman of the carpentry work on the building and was entrusted with and exercising superintendence over the work and whose sole or principal duty was that of superintendence; that by reason of the negligence of Coram in superintending the placing in position of a heavy timber in the building, the plaintiff, who was at the time engaged in the placing of the timber, was greatly injured; that the plaintiff was in the exercise of due care and diligence; and that the plaintiff gave the defendant due notice in writing of the time, place and cause of the injury within sixty days from the time of the accident.

On motion of the defendant the plaintiff filed three specifications, of which the third was waived at the trial. The other two were as follows:

"1. Said superintendent was negligent in that he caused a certain derrick, used in placing in position the heavy timber referred to in the plaintiff's declaration, to be set in an improper position with reference to said heavy timber.

"2. Said superintendent was negligent in that while said derrick was so improperly set with reference to the said heavy timber and while said heavy timber was connected with said derrick so improperly placed, he gave orders to the man in charge of and operating said derrick to hoist on the same, by reason of which said heavy timber struck the plaintiff and caused the injury complained of."

In the Superior Court the case was tried before *White*, J.

The plaintiff testified in direct examination that he had worked as a carpenter for eighteen years, for seven years employed by the defendant, and had been engaged for the defendant in the same kind of work as that under way when he was injured for four or five weeks before his injury. There was no question as to his being a competent and experienced workman.

It appeared in evidence that the work which was going on was the placing in position of a timber about twenty-five feet long, its other dimensions being ten by sixteen inches, and weighing about twelve hundred pounds, in the course of the erection of a mill in Lowell; that the timber was to serve as a floor beam to support the fourth floor of the mill and was being raised from

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the third floor; that when in position one end of this floor beam was to rest upon an iron plate in a brick wall while the other was to extend half way over the top of a wooden column eleven and a half feet high and eight and a half inches in diameter and was to rest upon an iron cap placed thereon; that a portable, single arm derrick was used in placing the timber in position, consisting of an upright stationary mast about twenty feet high, resting upon, and with its bottom fastened to, a timber forming its base, to which it also was connected by two wooden supports or braces, one on each side of the mast, extending from a few feet above its foot diagonally down to the base timber, while from the top of the mast two guy ropes, one on each side, extended at right angles with the base timber to further secure and steady the derrick when in operation; that a pulley was set in the mast near its top through which ran a rope down to and connected with a drum or crank at the base around which it was coiled, the other end of the rope being left free to attach to the weight to be moved; that the derrick was operated by men standing at the base winding or unwinding the coil of rope by means of handles on the drum as it might be required to hoist or lower the weight; that although the mast and pulley were stationary, the derrick could be inclined somewhat in either direction in which the guy ropes extended by lengthening and shortening the guy ropes as might be required to hold the derrick steady in such inclined position. It was admitted that during the process of handling such a timber as the one which caused the accident to the plaintiff, and while its weight was suspended upon it, this derrick could be moved readily, and that this had been done frequently; that in order to set the floor beam in its proper position one man should stand on the brick wall near the iron plate thereon, the brick wall being then up to a level with the top of the column, to guide that end of the beam on to the iron plate while another man stood at the other end of the beam near the column to guide that end; that in order to bring the man, who was to guide the column end of the beam to its proper place, into such position as would enable him so to do, a wooden horse about eight feet in height was employed, the top of which was about five feet long; that in the floor of the mill where this work was progressing there was at the time an

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opening twenty-seven feet long and eight feet wide beginning at a point a few feet toward the wall from the column and extending throughout most of its length beyond the column, this opening having been left for the purpose of hoisting up from the lower floors timbers, columns and other things, and, before placing this wooden horse in the position which it occupied at the time of the accident, a few planks were placed over part of this hole to rest the horse on; that at the time the accident happened the defendant himself was not present, but his foreman, one Coram, mentioned in the declaration, was present directing the work; that the derrick was placed in position under Coram's direction by the plaintiff and another employee.

It was not contended that the guy ropes were insecurely fastened, or that the derrick slipped at all or moved of itself in any way, during the subsequent events before the accident.

It further appeared that no floor beams previously had been set on that floor but similar beams had been set in the same manner on lower floors of the building, that, in the work of placing these other beams, the plaintiff had stood on the wooden horse near the column and had adjusted that end of the beam thereon, and that upon the occasion in question and because of the open space in the flooring above referred to, the plaintiff inquired of the foreman, before they began to hoist the beam, where he should set the wooden horse; that the foreman thereupon directed the plaintiff to board over a part of the open space near where the base of the column was to rest, indicating the precise portion to be so covered, and that the plaintiff did so, laying the planks where the foreman, who was standing by, directed, and stopping when and where the foreman directed; that the portion of this opening so temporarily planked was such that the only space afforded by it to set the wooden horse upon was close to the base of the column and on the side of it nearest to the derrick, so that in standing on the horse to adjust the end of the timber on the column the plaintiff stood on the side of the column nearest to the derrick and between a line drawn from the column to the iron plate on the brick wall and a line drawn parallel thereto through the base of the derrick, with his face turned toward the column and his back to the derrick and the brick wall beyond.

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The plaintiff testified in cross-examination that it would have been a safer position for him if the wooden horse had been on the other side of the column farthest from the derrick, so that when adjusting the beam he could have stood facing the column and the derrick and the brick wall beyond, that in such position the timber if it swung would not have struck him, and that he could have planked over that part of the open space so as to have set the wooden horse in such position as well as to have planked where he did, had the foreman ordered him so to do.

It further appeared in evidence that when the derrick was so set and the planking so temporarily laid, but before the column itself was raised or the wooden horse was set up, the loose end of the rope running over the pulley on the derrick was attached to the floor beam then lying near and about in front of the derrick, and that the men operating the derrick drum were ordered by the foreman to hoist; that at the same time the plaintiff and another workman procured the column and set it in position; that they did this by bringing it from some place near on the same floor, each carrying an end, and set it up; that the plaintiff then got the wooden horse from where it was standing close by, leaving the other man holding the column in position, and set the horse in the place previously prepared for it; that the plaintiff then mounted the horse with an iron cap, weighing some seventy or eighty pounds, and adjusted this to the top of the column, the beam having been in the meantime swung up by the operation of the derrick so that the end nearest the column was hanging just about over the column's top; that the plaintiff was a man of about medium height; that, having set the iron cap on the column, the plaintiff guided the end of the beam on to the cap, while another workman at the opposite end standing on the brick wall guided that end of the beam toward the iron plate fitted to receive it; that it then was found that the beam did not hang horizontally and that its heavier end was a little too far over the column while the other end was not quite far enough over the brick wall to fit in its proper position on the iron plate, but so swung, slanting downward toward the column, that it did not reach its proper place on the plate; that the foreman, who then was standing on the brick wall to assist in guiding that end of the beam, thereupon gave orders to the men

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operating the derrick to "ease up," which was done, and the beam thus was lowered until one end rested on the wall near the iron plate and the other end on the column, but that neither end was exactly in proper position; that the plaintiff, when the strain was thus eased off the beam, left his place on the wooden horse and came down to the floor as he testified, to "get something" or to "do something," he did not recall just what; that the man on the brick wall then, by the foreman's orders, crawled out on the beam and moved the chain or rope connecting it with the pulley a few inches toward the column and then returned to the brick wall, whereupon the foreman from the brick wall ordered the plaintiff to get back and guide that end of the timber; that the plaintiff thereupon again mounted the horse, standing in the position before described, with his back to the derrick, and the foreman again ordered the men operating the derrick drum to "hoist"; that immediately upon the execution of this order, the beam instead of rising upward was pulled or swung against the plaintiff, knocking him from the horse and occasioning the injuries complained of, while at the same time the column, which was then being further steadied by a man standing at its foot, was pulled out from his control and fell, together with its iron cap, in the same direction in which the plaintiff fell.

Upon cross-examination the plaintiff testified that he had helped raise timbers in the same way many times and had helped raise the timbers on the second and third floors on this job; that when the derrick rope first lifts the timber, the latter usually tips somewhat, owing to the fact that one end of it is likely to be heavier than the other, but that until the beam has been lifted it is practically impossible to tell which end, if either, will prove to be the heavier; that on the occasion in question he did not remember whether Coram gave him any order about procuring the column or not, but knew that it was necessary to get a column and that they might have got it at the proper time without an order; that he did not remember whether any order was given to get a horse, but thought that one was given; that he knew some positions were more dangerous in which to set the horse than others; that he knew that as the timber swings things are likely to be hit; and that he stood upon the horse for the purpose of steadying the timber; that when he mounted the

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horse the second time he knew that the timber was to be hoisted and went up there for the purpose of guiding the timber and help steady the column, and that it was while he was attempting to do this that the timber pushed him from the horse.

There was no evidence that in any of his previous work guiding such floor timbers into position the plaintiff had stood with his back to the derrick.

The man who was stationed on the brick wall, one Eagan, was called as a witness by the plaintiff, and, besides his testimony, there was no other evidence except as to damages.

At the close of the plaintiff's case, the judge was asked to order a verdict for the defendant; and, upon the parties each agreeing that the damages sustained by the plaintiff amounted to $450, the judge ordered a verdict for the defendant, and, with the consent of the parties, reported the case for determination by this court. If the ruling was correct, judgment was to be entered upon the verdict; otherwise, judgment was to be entered for the plaintiff in the sum of $450.

J. J. Devine, for the plaintiff.

F. E. Dunbar, (*A. C. Spalding* with him,) for the defendant.

HAMMOND, J. There is no evidence that the order to hoist was not properly executed. Nor is there any evidence that it was given at an improper time. The workmen including the plaintiff were all prepared and needed no further warning. It was given at the time expected, for the purpose intended, and under the circumstances known to all. The only trouble was that it was given when, as contended by the plaintiff, the derrick was in an improper location. Under these circumstances the plaintiff must stand solely upon his right, if any he has, to hold the defendant responsible for the improper location of the derrick.

Even if it be assumed that the derrick was improperly located, — a question not without difficulty, — still the question remains whether, as against this plaintiff, there is any evidence of negligence or failure of duty on the part of the superintendent for which the defendant is answerable.

Upon an examination of the evidence we are of opinion that it would not have warranted a finding for the plaintiff on this issue. He was a carpenter of eighteen years' experience, during

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seven of which he had been in the employ of the defendant. And there was no question as to his being a competent and experienced workman. Moreover, for four or five weeks immediately preceding his injury he had been at work on the same kind of work as that in which he was engaged when hurt. The work was comparatively simple in its nature. The beams were not large and he knew that they were liable to swing. It was his duty to guide one end of them into place. He knew thoroughly the location of the derrick and its relation to the place where the beam was to be put. He was upon the wooden horse when the beam was first hoisted and before the rope was readjusted so as to keep the beam nearer level when in the air. He testified upon cross-examination that "it would have been a safer position for him if the wooden horse had been on the other side of the column farthest from the derrick" on the top of which his end of the beam was to rest (instead of being between the column and the derrick as it actually was) "so that when adjusting the beam he could have stood facing the column and derrick and brick wall beyond and in such position that the timber if it swung would not have struck him." He also said that "he knew some positions were more dangerous in which to set the horse than others; that he knew that as the timber swings, things are likely to be hit; and that he stood upon the horse for the purpose of steadying the timber; that when he mounted the horse the second time, he knew that the timber was to be hoisted and went up there for the purpose of guiding the timber and help steady the column, and that it was while he was attempting to do this that the timber pushed him from the horse."

Here then was a competent and experienced mechanic, engaged in a work with which he was perfectly familiar and which was of a comparatively simple nature, all the circumstances being right before his eyes, including the location of the derrick and its relation to the column, the wooden horse, the wall and all other objects the relative position of which were of any materiality. He knew of a position perhaps safe in which the horse might be put to avoid exactly the thing which happened, namely, the timber striking him when it swung. Any warning from the superintendent would have given him no information which he did not already have. Under the circumstances the

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superintendent had no reason to suppose that, so far as respected a man of the experience and capacity of the plaintiff, there was any occasion to change the location of the derrick or to give him any warning as to his conduct.

Judgment upon the verdict.

HOLLIS R. BAILEY, trustee, *vs.* CAROLINE A. WOOD & another.

SAME *vs.* CAROLINE A. WOOD.

SAME *vs.* MERCY L. WOOD.

Suffolk. January 26, 1909. — June 24, 1909.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, & BRALEY, JJ.

Insurance, Life. *Husband and Wife. Bankruptcy. Assignment. Equity Pleading and Practice*, Parties. *Equity Jurisdiction*, For an accounting.

Under the provisions of R. L. c. 118, § 73, money paid by an insolvent person as premiums on an insurance policy on his life, as a gift for the benefit of a third person, is money paid in fraud of creditors, which with interest thereon inures to their benefit from the proceeds of the policy, and the same rule applies where the third person is the wife of the insured.

Under R. L. c. 118, § 73, the trustee in bankruptcy of the estate of one, who while insolvent assigned insurance policies on his life to his wife and paid premiums thereon while insolvent, has no claim upon the proceeds of such policies except for the amount of premiums paid by the bankrupt while insolvent, and § 70 of the bankruptcy act of 1898, in regard to the surrender value of policies payable to the bankrupt or his personal representatives, has no application, where it does not appear that the amount of premiums paid in fraud of creditors exceeds the surrender value.

In a suit in equity by a trustee in bankruptcy of the estate of one, who while insolvent assigned insurance policies on his life to his wife and paid premiums thereon while insolvent, to obtain from the proceeds of the policies the amount of insurance premiums thus paid in fraud of creditors, the insurance companies which issued the policies are not necessary parties, and the plaintiff either may join them as defendants or may protect himself by giving to the companies notices in writing as provided in R. L. c. 118, § 73.

Under R. L. c. 118, § 73, the right of a wife to the proceeds of insurance upon the life of her husband extends, not only to policies which are payable to her or for her benefit when issued, but also to those which, after issue, are assigned to or in any way made payable to her, while the right of any other beneficiary, as

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against creditors of the insured, is confined to policies expressed to be for his benefit at the time of their issue.

A life and endowment policy of insurance, known as a "fifteen-year policy," was taken out by a man upon his own life, and was made payable to him or to his estate. Afterwards the insured assigned the policy to his sister, then unmarried and a member of his family. She died, without having married, and her beneficial interest in the policy passed to the insured as her sole next of kin. Shortly afterwards, the insured, who later was adjudged a bankrupt, being then the sole owner of the policy, and knowing at the time that he was insolvent, made a voluntary conveyance of it to his daughter. The transfer was effected by changing the policy so that it read for "the benefit of his daughter M. absolutely in any and every event whether the policy becomes a claim by reason of his death or by maturity, provided only that she survive him." Later the policy matured in the lifetime of the insured, and his daughter collected the full amount of it, which was $5,000, and this sum "was received and used by her for her own purposes." The trustee in bankruptcy of the estate of the insured brought a suit in equity against the daughter to recover for the benefit of creditors the amount received by her under the policy. *Held*, that in substance the transaction was an assignment and was a transfer by the bankrupt to his daughter of a valuable asset as a gift; that the daughter was given no right as against creditors by the provisions of R. L. c. 118, § 73, because the policy was not made for her benefit when it was issued; therefore that the transfer was void as against the creditors of the bankrupt, and that the plaintiff as trustee in bankruptcy was entitled to the proceeds of the policy and to an accounting by the defendant for the money which she had received. And, *it seems*, that, even if the policy had been made originally in the form to which it was changed at the time of the transfer, the plaintiff still might have maintained his bill, because, as the transfer to the daughter was contingent on her surviving her father, the bankrupt still would have a contingent interest in the proceeds of the policy which, as against his creditors, he could not give away.

THREE BILLS IN EQUITY, filed in the Superior Court on July 8, 1908, by Hollis R. Bailey as trustee in bankruptcy of the estate of James A. Wood of Cambridge, the first two suits having been brought to recover insurance premiums alleged to have been paid by the bankrupt in fraud of creditors, and the third suit having been brought to recover $5,000, as the full amount of the proceeds of a life insurance and endowment policy assigned by the bankrupt to the defendant in that case, the plaintiff alleging that the transfer of the policy to the defendant by the bankrupt was fraudulent as against his creditors.

In each case the defendants or defendant demurred to the bill.

In the Superior Court the three cases were heard together upon the demurrers by *Richardson*, J., who made orders overruling the demurrers; but, being of opinion that the orders overruling the demurrers so affected the merits of the contro-

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versies that the matters involved therein ought, before further proceedings, to be determined by this court, at the request of the defendants, he reported the cases for that purpose. If the demurrers, or any of them, were overruled rightly, the defendants were in such cases to answer; if the demurrers, or any of them, should have been sustained, the bills in such cases were to be dismissed with costs.

R. L. c. 118, § 73, provides, among other things, as follows: "If a policy of insurance is effected by any person on his own life . . . in favor of a person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds, against the creditors and representatives of the person effecting the same; . . . provided, that, subject to the statute of limitation, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, the company shall have written notice by or in behalf of a creditor, with specification of the amount claimed, claiming to recover for certain premiums paid in fraud of creditors. Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband, or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of this section relative to premiums paid in fraud of creditors."

G. W. Anderson, (*A. B. Hayden* with him,) for the defendants.

A. L. Millan, for the plaintiff.

HAMMOND, J. 1. Inasmuch as the first two cases involve each the same question of law, they will be considered together and apart from the third case. The policies were all taken out by James A. Wood (of whose estate in bankruptcy the plaintiff is trustee) in his name, upon his own life, were originally payable to him, his executors, administrators or assigns, and were

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subsequently assigned, one to the defendant Caroline, his wife, and Mercy, his daughter; and the others to Caroline. These policies are within the provisions of R. L. c. 118, § 73 (formerly St. 1894, c. 522, § 73); and the rights of the parties are determined by that statute. *Bailey* v. *Wood*, *ante*, 548.

Under this statute the assignee of each policy holds the same free from the creditors of James, provided however "that, subject to the statute of limitation, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy." Shortly stated, the assignee is entitled to the proceeds of the policy less sums for premiums paid in fraud of creditors. To such sums, with interest thereon, the creditors are entitled.

In each of these cases the bill, after stating that before the acts thereinafter complained of the said James had begun to make provision for the needs of his wife by donation, and that she also had acquired by gift and inheritance a large amount of property from persons other than her husband, alleges that at the times of the respective assignments the said James was insolvent; and it further avers "that at the various dates when each and every one of said premiums were paid on said policy, said Wood well knew that he was indebted beyond his probable means of payment and that his situation was such that he could not as a prudent man having an honest regard to the rights of his creditors transfer to his said wife, or to his said daughter, by way of gift, any of his property, and that as the plaintiff is informed and believes and accordingly avers, said James A. Wood was insolvent at the various dates when said premiums were paid as aforesaid. Said bankrupt paid said premiums in fraud of his creditors and intending to hinder, delay or defraud his then existing creditors and also his subsequent creditors."

It thus appears that the bill sets out a case where payments of premiums have been made in fraud of creditors; and accordingly it must be held in accordance with the plain reading of the statute that so far as respects this branch of the case the demurrer must be overruled.

Ordinarily the opinion on this branch of the case would stop here. It is urged, however, by the defendants that a bankrupt has a right to make a reasonable provision for his wife and family

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by way of insurance upon his life, and that even if the payment of premiums for such insurance does reduce the fund which otherwise would go to his creditors, they cannot complain, inasmuch as their rights are secondary to the reasonable necessities of the bankrupt's family. If this case goes back for trial, it may be urged at the close of the evidence that upon this ground it fails to show that the sums paid for premiums were not unreasonable and therefore were not in fraud of creditors, although appreciably reducing the fund otherwise available to meet their claims. It seems advisable to discuss this ground of defense at this time.

In the absence of any statute there has been much diversity of judicial opinion as to the rights of the wife of a bankrupt, so far as respects the proceeds of an insurance policy taken out by the bankrupt in his own name, upon his own life, and afterwards assigned without valuable consideration to his wife or for her benefit and that of her children.

In England it is held that the creditors of the bankrupt are entitled to the entire proceeds of the policy where it is settled upon the wife of the bankrupt while he is insolvent. Perhaps the most recent case is *Taylor* v. *Coenen*, 1 Ch. D. 636. In giving the opinion in that case Vice Chancellor Malins uses the following language: "It is said that the settlement was of very trifling amount, considering the extent of his business; that he had only paid premiums to a small amount, and that he could only have defrauded his creditors to the amount of those premiums. There is certainly a semblance of truth in that contention, but the answer to it is that the creditors have a right to all the property which would have belonged to him, and a considerable amount of property has been produced by these policies. In the state of his affairs he was not at liberty to reduce the amount of his property by the payment of the premiums, but as by paying the premiums he has kept on foot the policies, the creditors are entitled to have that property which resulted from such payment. It is true that if he had supposed the produce of the policies would go to his creditors he would very likely have allowed them to drop, and it was only for the sake of his wife and family that he paid the premiums. This view of the case may well be taken into consideration by the creditors themselves

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when they see the position to which the testator's widow is reduced; but all I can do is to carry out the law, by which I am bound to declare that the settlements are void as against the creditors, and all the property realized upon them must go to the creditors." Indeed, as stated by Mr. Williston in an able article in 25 Am. Law Rev. 185, 188, the English cases "give no countenance to the view that a voluntary settlement of a policy of life insurance is to be treated differently from such a settlement of other property, or that a voluntary settlement upon the wife of the insured is to be dealt with more favorably than a settlement upon another." See the following cases cited by him: *Skarf* v. *Soulby*, 1 Mac. & G. 364; *Penhall* v. *Elwin*, 1 Sm. & Giff. 258; *French* v. *French*, 6 DeG., M. & G. 95; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Neale* v. *Day*, 28 L. J. Ch. 45; *Stokoe* v. *Cowan*, 29 Beav. 637; *Freeman* v. *Pope*, L. R. 9 Eq. 206; L. R. 5 Ch. 538.

In *Central Bank of Washington* v. *Hume*, 128 U. S. 195, it was held that where an insolvent paid premiums upon a policy taken out upon his life by his wife, the creditors were not entitled to the proceeds of the policy. It was said by Chief Justice Fuller in that case that the obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children and payable to them has been repeatedly recognized by the courts. Upon this subject the opinion proceeds as follows: "Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are

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to be held to constitute such gift or transfer." It was further held that under the circumstances the creditors could not reach the premiums. Upon this the following language was used: "Cases might be imagined of the payment of large premiums out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. . . . The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. . . . It seems to us that the same public policy which . . . recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties [husband and wife] to the transaction should be made out." And it was accordingly held that the administrator of the deceased bankrupt's estate could reach neither the proceeds of the policies nor the amount of the premiums paid.

In many of the States of this Union the matter is regulated by statute. Some, as in Rhode Island, (Pub. Sts. 1882, c. 166, § 21,) limit the amount of the policy the proceeds of which go to the wife; others, as in Tennessee, (Code, 1884, § 3135,) do not; some, as in Alabama, (Code, 1886, p. 2356,) limit the amount of the premiums the bankrupt may pay from his estate; others, as in Pennsylvania, (Purd. Dig. 1873, p. 802,) do not; some, as in Georgia, (Code, 1882, § 2820,) respect only policies originally made in favor of the wife and children; others, as in Maryland, (Rev. Code, 1878, art. 51, §§ 24–26,) respect policies either originally so made or subsequently *bona fide* assigned to them. In several of the States there is a statute similar to ours.

In the absence of any statute we think the prevailing opinion in the States is that where a policy of insurance is originally taken out in the husband's name and payable to his estate, a voluntary assignment, when insolvent, by him to his wife is void as to his

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creditors. *Appeal of Elliott's Executors*, 50 Penn. St. 75 (decision made in 1865, before the Penn. St. of 1868, No. 64). *Stokes* v. *Coffey*, 8 Bush, 533. *Burton* v. *Farinholt*, 86 N. C. 260. *Catchings* v. *Manlove*, 39 Miss. 655. See also *Stigler* v. *Stigler*, 77 Va. 163; *Pullis* v. *Robison*, 73 Mo. 201; *Thompson* v. *Cundiff*, 11 Bush, 567; *Barry* v. *Equitable Assur. Soc.* 59 N. Y. 587. In the matter of *Succession of Hearing*, 26 La. Ann. 326, the majority of the court reached a contrary result. In several of the cases, including some of those above cited, it is said that this rule should not be applied when the policy is originally taken out in the name of or in behalf of the wife or children, or that in this last class of cases only the premiums paid by the husband when insolvent should be reached by his creditors. In *Merchants' & Miners' Transportation Co.* v. *Borland*, 8 Dick. 282, the court refused to follow *Central Bank of Washington* v. *Hume*, 128 U. S. 195, rejected the distinction between the two classes of cases, and squarely held that payments made by a husband, when insolvent, upon a policy of life insurance upon his own life for the benefit of his wife and child, are essential gifts to the beneficiary and are fraudulent and void as against creditors existing at the time of such payments.

It would not be profitable to discuss further the state of the authorities upon this general subject. They are irreconcilable in many respects. Whoever desires to pursue the subject further in detail will find in the above mentioned article in the American Law Review an able discussion of the law, with the citation of many cases; also in a note in 88 Am. Dec. 530, a good collection of the earlier cases, and in a note in 29 Am. St. Rep. 360, some instructive references to the later cases. See also the able and exhaustive opinion of Wilson, J., in *Hendrie & Bolthoff Manuf. Co.* v. *Platt*, 18 Col. App. 15, and 20 Cyc. 363, for a very full collection of cases.

In this state of the law what construction is to be given to R. L. c. 118, § 73? The legislation finally ending in this statute began with St. 1844, c. 82. It does not appear that up to the time of the passage of the statute our own courts had had occasion to consider the precise question of the relative rights of the wife and creditors of an insolvent debtor in these matters. But see now *Bailey* v. *Wood*, *ante*, 548. The statute was quite

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general, but we shall speak of it only as it affects the question before us. St. 1844, c. 82, did not cover policies assigned. It provided in substance that a married woman for whose benefit or in whose name the policy was taken out should hold the same free from the creditors of her husband and of the person who took out the policy, except that in case of any premium paid in fraud of creditors a proportional amount of the interest in the policy or of its proceeds should inure to the benefit of such creditors. The statute was amended so as to apply where the husband procured insurance on his own life expressed in the policy to be for the benefit of his wife (St. 1847, c. 248), and was further amended so as to apply to policies assigned or transferred. St. 1864, c. 197. As to the matter of premiums, it was amended so as to give the creditors only the amount of the premiums paid in fraud of them instead of a proportionate share of the proceeds, (St. 1854, c. 453, § 28,) and this right of the creditors was still further restricted by St. 1864, c. 197, to those premiums not barred by the statute of limitations.

In view of the then confused state of the law as to the relative rights of the wife on the one hand and creditors of the husband on the other, in and to either the proceeds of insurance upon the life of the husband or the premiums paid by him when insolvent for such insurance, both in cases where the policy was expressed to be made payable to him or his estate and afterwards was transferred to his wife, as well as in cases where the policy was expressed to be payable to his wife or for her benefit, we are of opinion that it was the purpose of this legislation to lay down plain and simple rules easily followed; and that the true intent and meaning of the statute was in the first place finally to establish the general right of the wife to the proceeds of insurance upon the life of her husband, whether the policy was originally for her benefit or whether, being originally for the benefit of the husband and his estate it was afterwards transferred to her, and whether or not the husband was insolvent at the time of the transfer; and in the second place to establish the right of the creditor to have the benefit of the premiums paid by the husband when insolvent, irrespective of the question of his duty to support his wife. As the statute was originally passed, as above stated, the right of the creditors was measured by a propor-

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tional part of the proceeds of the policy, but is now measured by the amount of premiums with interest subject to the statute of limitations. Such a construction of the statute clears away the haziness of the judicial atmosphere upon the subjects involved, and is just and equable. It restores to the creditors of the insolvent what has been taken away from the fund to which before the insurance they could have looked for the satisfaction of their claims, and gives the rest to the wife. Under this statute, accordingly, it must be held that money paid by an insolvent as premiums on a policy on his life, inuring to the benefit of a third party as a gift, is money paid in fraud of his creditors, and that the principle is applicable irrespective of the question whether or not the third party be his wife.

In *Gould* v. *Emerson*, 99 Mass. 154, there does not appear to have been any insolvency of the husband either when the policy was taken out or when the premiums were paid, and the point decided was that a life insurance policy expressed to be for the benefit of the widow and child of the assured could not be affected by his will. The remarks of Gray, J., on pp. 155, 156, as to the object of the statute are in no way inconsistent with this view.

There have been various decisions in other States upon similar statutes, among which see *Ionia County Savings Bank* v. *McLean*, 84 Mich. 625; *Lehman* v. *Gunn*, 124 Ala. 213; *Adler & Sons Clothing Co.* v. *Hellman*, 55 Neb. 266; *Hise* v. *Hartford Ins. Co.* 90 Ky. 101. In this last case the Court of Appeals of Kentucky, under a statute similar to ours, held that inasmuch as by the law of that State the insurance of the life of a husband for the benefit of his wife and children before the statute was valid against his creditors unless the amount of the insurance was unreasonable in view of his indebtedness and his ability to pay, the statute should be construed in a similar way as to what was fraudulent appropriation of his property for that purpose.

It is further urged by the defendants that even if the premiums were some of them paid in fraud of creditors the plaintiff is not entitled to any relief; that a policy of life insurance is merely a promise by the insurer to pay a certain sum at maturity of the policy upon certain conditions, one of which is the payment at stated periods of a certain premium; that the interest

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of the beneficiaries is simply contingent; that in this case the defendants have received nothing and may never receive anything; that the proceeds of a policy are the sums payable by the receiver according to the terms of the policy, and that until such sums are payable according to its terms there are no proceeds which can be reached.

While it is true that these beneficiaries have not yet received anything and may never receive anything upon these policies, and that therefore no decree can now be made directing them to pay to the plaintiff any part of the sums paid by the insolvent Wood in fraud of his creditors, it by no means follows that as between the plaintiff and the defendants their respective rights to the proceeds, when finally payable, cannot now be determined. The prayer of the plaintiff is in the alternative, namely, that the plaintiff may be entitled to a decree either to receive from the defendants the amount of the premiums fraudulently paid, or to receive the same out of the proceeds of the policies. Even if the fund is contingent and even if it may never become payable, we see no reason why the respective rights of the parties to this suit, as between themselves, may not be now settled. It is a right which can be assigned by the trustee in bankruptcy and by a sale of it the creditors may presently realize something out of it. See St. 1884, c. 285, (now R. L. c. 159, § 3, cl. 7,) *Alexander* v. *McPeck*, 189 Mass. 34, and cases there cited. Nor is there anything in § 70 of the United States bankruptcy act as to the surrender value of policies payable to the bankrupt or his personal representatives which is necessarily inconsistent with this. The defendants who are assignees of these policies hold them free from the power of the bankrupt without their consent to convey or surrender them. They hold them also free from any claims of creditors except for the amount of premiums fraudulently paid. For the amount only of the sums so paid can the plaintiff look to the proceeds of these policies. Should this amount exceed the surrender value, the contention of the defendants on this branch of the case will perhaps need consideration. It is unnecessary to consider it now. See *Pulsifer* v. *Hussey*, 97 Maine, 434.

Although one of the grounds of the demurrer is that the insurance companies have not been made parties, yet as that point

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is not argued on the brief of the defendants, we suppose that it is waived. It may be well to say, however, that we see nothing in it. The company clearly has no interest in the litigation, and in view of the language of the statute we think the plaintiff may either join the company as a party defendant or protect himself by giving the company a written notice as provided in the statute. The defendants are in no way prejudiced by a failure to join the company.

2. As to the third case. Here the circumstances as set forth in the bill are different. The policy, being what is known as a "fifteen-year policy," was taken out by the said James upon his own life, was originally made payable to him or to his estate, and was subsequently assigned to his sister Sarah, then unmarried and a member of his family. In August, 1902, she, never having been married, as we understand, died intestate, and her beneficial interest in the policy went to him as her sole heir and distributee. Shortly afterwards, he, being the person upon whose life the policy was issued and being the sole owner of the beneficial interest in it, and knowing at the time that he was insolvent, made a voluntary conveyance or transfer of it to his daughter, the defendant. The transfer was effected by changing the policy so that it read for "the benefit of his daughter Mercy Lucy Wood absolutely in any and every event whether the policy becomes a claim by reason of his death or by maturity, provided only that she survive him." On November 2, 1907, the policy matured and the defendant collected the full amount of the same, $5,000, and this sum "was received and used by her for her own purposes."

The first question is whether the defendant held this policy under the protecting wing of the statute. At the time of the transfer the said James was the full owner of the legal and beneficial interest in the policy. The defendant was not his wife. She was his daughter, apparently of full age and a member of his family. She was not a married woman, and therefore was not included within that part of the statute which relates solely to married women. Unless her case is described in the first part of the statute she is not within it. That part, so far as material, reads thus: "If a policy of insurance is effected by any person on his own life . . . in favor of a person other than

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himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds, against the creditors and representatives of the person effecting the same," subject to claims for premiums fraudulently paid as thereinafter provided.

The first statute in this line of legislation (St. 1844, c. 82) included two classes of policies, first, those made "on the life of any person expressed to be for the benefit of a married woman," and second, those "effected by any person on the life of another expressed therein to be for the benefit of such other or his representatives or for that of a third person." There was no language alluding to a transfer of any policy or a change in the beneficiary after its issue. The language plainly speaks in each class only of the condition of the policies when first issued. Nothing is said of policies which by assignment or otherwise have been changed in legal effect after their issue. By St. 1847, c. 248, the second class was enlarged so as to include a policy taken out by a person on his own life expressed to be "for the benefit of another." An important amendment was made by St. 1864, c. 197, which extended the statute so as to include a policy of insurance on the life of any person "duly assigned, transferred or made payable to any married woman, or to any person . . . for her benefit." By this amendment the provisions as to the policies of the first class, namely, those in favor of a married woman, were extended so as to embrace policies assigned or made payable to her after their issue. But this amendment was not applicable to the second class. That stood as before, and so has remained ever since.

There is a marked distinction, therefore, as to the right of a wife under this statute and the right of any other beneficiary. The right of the wife extends not only to policies expressed for her benefit when issued, but also to those which, after issue, are assigned or in any way made payable to her for her benefit, while the right of any other beneficiary is confined to policies expressed at the time of their issue to be for his benefit.

In the present case the insolvent, at the time of his transfer to his daughter, was, as has been said, the sole owner of the legal and beneficial interest in the policy, not only by reason of the original terms of the contract, but by virtue of his in-

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heritance as heir of his sister, the first assignee. It was a contract to pay him money at its maturity in November, 1907, or to his estate in case of his decease before that time. Before the assignment it was part of his assets to which the creditors had a right to look for the payment of their claims. It is true that he could have transferred it to his wife, and by the express language of the statute she could have held it, but the transfer was made not to her but to his daughter. The effect of this transfer to his daughter, if valid, was to diminish his estate by so much. It cannot make any difference that the transfer was made by changing the reading of the policy. Not merely the form but the substance of the transaction is to be considered, and the substance was a transfer from his own hand to that of his daughter of a valuable asset as a gift. The daughter can claim no benefit under the statute; and by the overwhelming weight of authority she cannot hold the policy under the common law. The transfer is void as against the creditors of the bankrupt. See the cases hereinbefore cited.

It may be remarked in passing that in any event the demurrer would have to be overruled, for the transfer to the daughter was contingent upon her surviving her father. The bankrupt still has a contingent interest in the proceeds of the policy which he, as against his creditors, cannot give away.

As the daughter has received the money she can be made to account for it in this proceeding. At this stage of the case it is not necessary to formulate the precise form of the decree. That must be determined after the hearing on the merits.

The demurrers having all been rightly overruled, the respective defendants, by the terms of the report, are to answer.

So ordered.

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STANDARD VARNISH WORKS *vs.* ALONZO B. CUSHING & another.

Suffolk. March 4, 5, 1909. — June 24, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, SHELDON, & RUGG, JJ.

Replevin. Practice, Civil, Verdict. *Estoppel.*

Chattels taken under a writ of replevin are in the custody of the law. The bond given by the plaintiff stands as security to the defendant for a proper disposition of the property according to the order of the court.

In an action of replevin against two defendants, one of them the mortgagor and the other the mortgagee of the goods replevied, the defendant mortgagor was defaulted, and the plaintiff offered no evidence of his title or of his right to the possession of the goods replevied, but filed a paper admitting that the defendant mortgagee did not retain or have in his possession the goods replevied when the writ was sued out, and asked the presiding judge to instruct the jury to find for this defendant on that ground. The judge refused to give this instruction, and instructed the jury to find for the defendant mortgagee on the ground that the plaintiff had failed to show any title to the property replevied sufficient to maintain the action. The jury returned a general verdict for the defendant mortgagee, and the plaintiff excepted to the refusal to give the instruction requested and to the instruction given. *Held,* that the exceptions must be overruled; that the failure of the plaintiff to prove any title to the property or a right to the possession of it was a sufficient reason for the return of the verdict, and that the plaintiff's failure to prove a taking or a detention of the property by the defendant mortgagee also was a good reason for the return of the verdict, and that it was not necessary for the verdict to show on which ground the jury reached their conclusion, as either ground was sufficient.

In an action of replevin the disposition of the property, which under the writ is in the custody of the court, is to be ordered according to the rights of the parties at the time of making the order, although such rights may have been changed since the date of the writ.

In an action of replevin against two defendants, one of them the mortgagor and the other the mortgagee of the goods replevied, the plaintiff failed to show any title to or right of possession of the goods. The defendant mortgagor, who had been adjudged a bankrupt, was defaulted and the trustee of his estate in bankruptcy, who had been made a party, also was defaulted. It appeared that at the date of the writ the defendant mortgagee had a good title as mortgagee and that, very soon afterwards, he had the right of immediate possession for a breach of condition of the mortgage, but that, before he could obtain actual possession of the goods, they had been removed from the hands of the defendant mortgagor on the plaintiff's writ of replevin. The jury returned a general verdict for the defendant mortgagee, and the defendant mortgagee asked the presiding judge for an order that the goods be returned to him. *Held,* that, although as a general rule in an action of replevin a return cannot be ordered to a person from whom the chattels were not taken, and, if the defendant mortgagor had not allowed himself to be defaulted, a return of the goods to him would have

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been ordered, yet the defendant mortgagee would have had the benefit of such a return as the owner of the goods with a right of immediate possession under the mortgage, and therefore that justice would be done by ordering a return of the goods to the defendant mortgagee. Moreover, although the replevin bond was not before the court, it was assumed that it recited a taking of the property from the joint defendants under the writ and that it was conditioned in part upon a return of the property to them if such was the order of the court, so that a return to the defendant mortgagee would be a compliance with the requirement of the bond in that particular, and the plaintiff by the recital in the bond was estopped to deny that the property was replevied from the defendant mortgagee when in possession of it.

REPLEVIN for a certain varnish described in the writ. Writ dated November 21, 1900.

At the trial in the Superior Court before *Richardson*, J., Mr. Sears, one of the attorneys for the original defendant, Frank R. Milliken now deceased, was called as a witness by the plaintiff, and testified in substance as follows:

Frank R. Milliken, the testator of the defendant Annie S. Milliken, executrix, on or about April 28, 1900, advanced to the defendant Cushing the sum of $3,000, taking a note of Cushing payable in six months from April 28, 1900, and a mortgage securing it covering the property in the store occupied by Cushing in the city of Boston. The mortgage was made to secure the payment of this note and contained the usual clauses entitling the mortgagee to take possession. This mortgage never was recorded. The note was not paid at its maturity. At that time Milliken was seriously ill at his home. At his request a friend of his, one Snow, and the witness took possession of the property covered by the mortgage in his name and behalf for the purpose of foreclosing it for breach of condition in failing to pay the note. At that time the mortgage was overdue.

Snow and the witness went to the store and entered it, Cushing pointed out to them everything that was included in the mortgage, and they took possession of and held the property for Milliken for breach of condition of the mortgage and for the purpose of foreclosing.

Mr. Sears remembered distinctly taking possession of the varnishes which subsequently were replevied by the plaintiff. There was a considerable quantity of consigned merchandise which was separated from the merchandise which Cushing owned.

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The varnishes in question Cushing stated were his property and were included in the mortgage. At this time Mr. Sears stated to Cushing that Milliken did not wish to embarrass him, and if his financial condition was satisfactory, would be willing to reconvey the property that Mr. Sears had taken possession of and accept a new mortgage for a short period of time, which at once would be recorded.

At this time Cushing gave to Mr. Sears a statement of his financial condition, showing a balance of estimated assets over estimated liabilities of $6,500.

Cushing signed and made oath to this statement before Mr. Sears. Mr. Sears asked Cushing to be very careful not to exaggerate his assets and to include all his liabilities.

After receiving this statement of assets and liabilities, and after some further talk that Mr. Sears had with Cushing on the subject of his financial condition, Mr. Sears gave Cushing a reconveyance which previously had been signed by Milliken of the property covered by the mortgage, and received from Cushing contemporaneously a new mortgage and mortgage note conditioned on the payment of $3,000 in thirty days from date, namely, on November 1, 1900.

Mr. Sears and Snow thereupon gave possession of all the property to Cushing and left Cushing in possession. This later mortgage was duly recorded on November 3, 1900, in the city clerk's office in Boston and in the city clerk's office in Somerville, where Cushing lived, on November 7, 1900, both mortgages purporting to convey to Frank R. Milliken the varnishes which subsequently were taken by the plaintiff on the writ of replevin in this case. The next thing done by Mr. Sears under the mortgage was on December 3, 1900.

The new mortgage was not paid at its maturity, and thereupon pursuant to its terms for breach of condition thereof, Mr. Sears, as agent for Milliken, on December 3, 1900, again took possession of certain property which remained in the store. Snow, as before, accompanied him. At this time the goods replevied in this action were no longer in the store. They had been replevied from the defendant Cushing on November 21, 1900, and were delivered by the replevying officer to the plaintiff on the following day. Up to this time there had been no breach

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of the mortgage to the knowledge of Mr. Sears, unless the replevin was a breach.

On December 12, 1900, the property of which Mr. Sears had taken possession for Milliken on December 8, 1900, was sold pursuant to the terms of the mortgage at public auction after extensive advertising, and yielded after all expenses were paid $1,519.76, which was all that ever was received on account of this mortgage. Milliken did not buy the property at the sale.

On December 5, 1900, the defendant Cushing was adjudged a bankrupt on a voluntary petition filed on that day in the District Court of the United States, and a trustee in bankruptcy was appointed in those proceedings on December 27, 1900.

Mr. Sears testified that from the similarity of the names on the packages, he should judge that the varnishes replevied were manufactured by the plaintiff, and he thought that Cushing mentioned that they had come from the Standard Varnish Works.

Cushing was insolvent when he filed his petition in bankruptcy, his schedule showing liabilities of $17,000 and practically no assets.

Among the papers in the case, one was found called "motion for judgment," and was read by the plaintiff's attorney; it appeared from the clerk's indorsement thereon to have been filed on December 13, 1904, but without leave of the court, or leave of or notice to the defendant Milliken, in the following terms:

"Now the plaintiff in the above entitled case admits that at the time of the suing out of the writ in this cause and of the seizure of the goods thereunder, as set forth in the officer's return thereon, the defendant Frank R. Milliken now deceased was not detaining or in possession of said goods, but that the said goods were in the sole possession of the defendant Alonzo B. Cushing, and the plaintiff therefore consents that upon the issue made by the defendant's traverse of the allegations of such retention and possession a finding may be made in favor of the defendant Annie S. Milliken that the said Frank R. Milliken was not in possession of or detaining said goods and never had detained said goods, and that upon said finding and not upon the plaintiff's title, possession and right of possession, judgment be

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entered for said Annie S. Milliken for her costs. Wherefore the plaintiff moves that judgment be entered for the plaintiff against the defendant Alonzo B. Cushing for one cent and for his costs.

"By its Attorneys,

"Brandeis, Dunbar & Nutter."

No notice of the filing of this document was given to the attorneys for Mrs. Milliken, and neither Mrs. Milliken nor her attorneys were aware of its filing until the paper was produced and read by the attorney for the plaintiff at the trial.

Notice of its filing was given, however, to the attorney for the defendant Cushing, who previously to the receipt of such notice had been defaulted.

The trustee in bankruptcy of the defendant Cushing, who became a party defendant, also was defaulted before the trial.

The plaintiff offered at the trial before the introduction of the evidence and at the close of the evidence to consent to a verdict for the defendant Annie S. Milliken, executrix of the original defendant Frank R. Milliken, on the ground as the plaintiff alleged that the original defendant Frank R. Milliken was not in possession when the action was brought and the goods were replevied, provided it was understood that no question of title should be determined by the verdict of the jury. The counsel for the defendant Milliken declined to consent to a verdict in this form.

The plaintiff asked the judge to give to the jury the following instructions:

"1. As the plaintiff admits that Frank R. Milliken was not detaining the goods replevied the defendant Milliken is entitled to a verdict and it is unnecessary for you to decide whether or not the plaintiff had title to them when this action was begun.

"2. If Frank R. Milliken was not detaining the goods replevied then you must give a verdict for the defendant Milliken without passing upon the question of the plaintiff's title to them when this action was begun.

"3. If Frank R. Milliken was not detaining the goods replevied then the defendant Milliken is entitled to a verdict irrespective of whether or not the plaintiff had title to them when this action was begun.

4. "On all the evidence the plaintiff has not established that

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Frank R. Milliken was detaining the goods replevied and your verdict must therefore be for the defendant Milliken."

The judge refused to give any of these instructions, and instructed the jury to find for the defendant Milliken on the ground that the plaintiff had failed to show any sufficient title to the property replevied to maintain this action against her.

Thereupon the jury returned a verdict for the defendant Annie S. Milliken, executrix; and the plaintiff alleged exceptions.

There was a second bill of exceptions as follows:

"This is an action of replevin. Reference may be had to the pleadings.

"The plaintiff duly excepted to certain instructions, rulings and refusals made by the court at the trial of said action and duly filed its bill of exceptions, and said bill of exceptions as finally allowed by the court is made a part hereof and all its allegations are here repeated.

"After the trial of said action, and while the aforesaid exceptions were still pending, the defendant Annie S. Milliken moved for a return to her of the goods replevied in said action.

"At the hearing on said motion it was agreed between counsel that for the purposes of said motion all statements made in the aforesaid bill of exceptions as finally allowed by the court, including the statements made by Mr. Sears as witness, might be considered by the court to be true. No other evidence was introduced at said hearing.

"After due hearing the court allowed said motion.

"The plaintiff duly excepted to the order of the court allowing said motion and prays that the said exception be allowed."

E. F. McClennen, for the plaintiff.

L. C. Southard & J. S. Farlow, for the defendant Milliken.

KNOWLTON, C. J. Chattels taken under a writ of replevin are in the custody of the law. The bond given by the plaintiff stands as security to the defendant for a proper disposition of the property, according to the order of the court.

At the trial of this action of replevin the plaintiff offered no evidence of its title or right of possession of the goods replevied, but filed a paper admitting that the testator of the defendant Milliken did not retain or have in possession the goods replevied when the writ was sued out. It asked the presiding judge to

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instruct the jury to find for the defendant Milliken, on the ground stated in this written admission. The present defendant Milliken is the executrix of the will of Frank S. Milliken, who was the original defendant of that name, and was the holder of a mortgage on the replevied property. The judge declined to give the instruction, but instructed the jury to find for this defendant on the ground that the plaintiff had failed to show any title to the property replevied, sufficient to enable it to maintain the action. The plaintiff excepted to the instruction and to the refusal to instruct. A general verdict was returned for this defendant.

These exceptions must be overruled. The first thing for the plaintiff to do in support of its claim was to prove title to the property and a right of possession of it. Its failure to do this was a sufficient reason for the return of a verdict for the defendant. Its failure to prove a taking or detention of the property by Milliken was also a good reason for the return of the verdict. The verdict returned and the record of the case do not show on what ground the jury reached their conclusion, and it is not necessary that they should.

The second bill of exceptions is founded on the allowance of the motion of the defendant Milliken for an order of return of the property to her. The defendant Cushing and his trustee in bankruptcy had been defaulted. On the record, therefore, Cushing had no standing to ask for any order or proceeding in his favor. On his default the plaintiff's case was established as against him. Under the verdict of the jury the plaintiff failed to establish his case against Milliken. It remained for the judge to determine, upon a proper application, what order should be made as to the possession of the replevied property. The plaintiff was content and asked for no order. The defendant Milliken moved for a return of the property to her.

Ordinarily the verdict of the jury settles the rights of the parties in this particular. But sometimes it does not, and it then becomes the duty of the judge to inquire further and determine who is entitled to the possession. In this case the default of Cushing and the verdict in favor of Milliken, without more, did not enable the judge to decide who ought to have the property. Except by way of inference as against Cushing from

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the default, the plaintiff proved no title or right of possession. The verdict of the jury showed no rights in the plaintiff as against Milliken. Thereupon the parties agreed that the judge might decide the question upon certain evidence which was to be taken as true. From this it appears that the plaintiff had no title or right of possession as against the defendant Milliken at the time of the hearing on the motion, and it was not shown to have had any right or title as against anybody. It appeared that Milliken had a good title as mortgagee when the writ was sued out, and that, very soon after, he had a right of possession for a breach of the condition of the mortgage, and that actual possession would have been obtained if the property had not been removed previously under a writ of replevin.

In an action of replevin, the disposition of the property is to be ordered according to the rights of the parties at the time of the making of the order. *Ware River Railroad* v. *Vibbard*, 114 Mass. 458. *Davis* v. *Harding*, 3 Allen, 302. If the property had been taken on this writ from the possession of Milliken, there is no doubt that a return to his executrix should have been ordered. But Milliken was not in possession of the property, and it is a general rule that a return cannot be ordered in an action of replevin to a person from whom the chattels were not taken.

The principles to be applied under such conditions were somewhat considered in *Whitwell* v. *Wells*, 24 Pick. 25, 32, 33, 34, in which justice was worked out between the parties, in connection with a previous sale of the goods to enforce a lien. Said Mr. Justice Morton, "The object of a judgment in favor of the defendants, should be to place them in the same or as good a situation as they were in when the suit was commenced. More than this, no suitor ought to desire. The defendants never having had possession of the goods, ought not to acquire it by a suit against them. A decree to *return* the goods to the defendants would be absurd, as they never had the possession of them. . . . It sometimes happens, that, by a change of property, after the replevin and after the pleadings are closed, it becomes useless and improper to render such judgment as seems to be required by the state of the record. The facts upon which the pleadings are founded, cease to exist before the final judgment. In such case,

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the court will receive evidence of the intervening facts, and render judgment according to the justice of the case at the time."

It is the purpose of the court in all these cases, so far as possible under the pleadings, to make such an order for the disposition of the property as is conformable to the rights of the parties before the court. *Quincy* v. *Hall*, 1 Pick. 357, 360. *Barry* v. *O'Brien*, 103 Mass. 520. *Dawson* v. *Wetherbee*, 2 Allen, 461. *Johnson* v. *Neale*, 6 Allen, 227. The only question of difficulty in this case is whether the fact that Milliken was not in possession of the property when it was replevied, although he had a perfect title by mortgage from the defendant Cushing who was in possession of it, will prevent the court from making an order that will restore him to his rights, of which he was deprived by the removal of the property under the writ. Milliken was made a joint defendant before the court. Although he was not technically in possession when the writ was served, he had a right which, but for the service of the writ, would have put him in possession in less than two weeks, and which entitles his executrix to possession now. Upon the facts proved, if Cushing had not suffered default, the court would have ordered a return of the goods to him, of which Milliken would have had the benefit as owner under his mortgage, with a right of immediate possession. Shall the default of Cushing prevent the court from making an order for the proper disposition of the property, which will protect the rights of the true owner? The relation of the defendant Milliken to the plaintiff as a party in the case, her relation to Cushing, who represented her husband's right in the possession which he was maintaining, and her relation to the goods themselves as the real owner, are such that she is entitled to an order for the return of them to the custody from which they were taken. If Cushing were before the court it would be his duty to ask for such a return. If he failed to ask for it, we are of opinion that she might ask for it on the ground that the law and the facts require it, and that it should be made for her benefit, as she is the only one interested in the goods adversely to the plaintiff. This would place her in the situation as to possession in which her testator was when the goods were replevied. What her situation would be, in reference to a remedy, if this action

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were ended without any order as to the disposition of the property, we need not consider.

The default of Cushing ought not to prejudice the other defendant in the maintenance of her rights.

The replevin bond in the case is not before us, but we assume that it recites a taking of the property from the joint defendants under the writ and is conditioned in part upon a return of it to them if such is the order of the court. A return to the defendant Milliken would therefore be a compliance with the requirement of the bond in that particular. Under the recital in the bond the plaintiff is estopped to deny that the property was replevied from her husband, the original defendant Milliken, and that he was in possession of it.

Upon the facts agreed justice will be done by a return to the present defendant Milliken, and we are of opinion that the order was correct.

Exceptions overruled.

CORNELL-ANDREWS SMELTING COMPANY *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION.

Bristol. March 15, 1909. — June 24, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Conduct of trial, Challenging jurors. *Landlord and Tenant*, Construction of lease. *Contract*. *Way*, Private, Of necessity. *Grade Crossing*. *Damages*, For property taken or injured under statutory authority, Mitigation.

Where the owner of certain real estate, which has been damaged in the course of the abolition of a grade crossing of a railroad with a town way, and one who occupies it under a lease from the owner severally bring against the railroad company petitions for an assessment of the damages which they have sustained, and, under R. L. c. 48, §§ 20, 23, the cases are tried together, each party, under R. L. c. 176, § 29, is privileged to challenge four jurors without assigning any cause.

Where, by the provisions of a lease in writing, the lessor grants to the lessee "a right of way of at least twelve feet in width from the northerly line of said lot [described in the lease] to the cart path . . . and to a point on said cart path within two hundred feet at least from" land of an adjoining owner, "together with a right of way over said cart path or equally convenient way . . . to M. Street," and the lessee, with the acquiescence of the lessor, adopts and uses a way within the location mentioned, a definite assignment of the way is effected; and if, in accordance with a decree made in grade crossing proceedings under

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R. L. c. 111, §§ 149–152, as amended by Sts. 1902, c. 440, § 3; 1905, c. 408, § 2, a new street is constructed upon an embankment which lies between the cart path and the land leased and is elevated from twenty-four to thirty-eight feet beside such land, the private way thus established is discontinued and extinguished.

Where, in a lease of a parcel of real estate, which is in one corner of a large tract owned by the lessor, the lessor grants to the lessee a right of way from the land described to a certain cart path "together with a right of way over said cart path or other equally convenient way" to certain points at the termini of the cart path, and, under authority of a decree abolishing a grade crossing of a railroad with such cart path, a new street is constructed upon an embankment which lies between the cart path and the land leased and rises from twenty-four to thirty-eight feet above them, the lessor cannot be compelled to assign to the lessee another convenient way connecting the leased premises with the points beyond the termini of the cart path, nor is a way of necessity created for the lessee by such acts of eminent domain occurring after the execution of the lease.

Where the owner of a large tract of land leases for a term of ten years a portion of it to a manufacturing corporation, together with a right of way connecting the leased premises with a cart path on the land of the lessor not included in the lease, which leads to public streets, and the lessee thereupon places upon the land leased a building containing fixed machinery, and subsequently, in accordance with proceedings for the abolition of a grade crossing of a railroad with a way, which were begun after the lessee had so built upon the land, a new way, extinguishing the way given to the lessee by the terms of the lease, is constructed upon an embankment which lies between the cart path and the premises leased and rises from twenty-four to thirty-eight feet above them, and both the lessee and the lessor severally petition for an assessment of their damages, the jury should be instructed to assess separately the damages to the leasehold and those to the reversion; and the lessee in its suit can recover the difference between the fair market value of the leasehold, including the improvements, as it was on the date of the decree and such value as it had after the construction of the crossing and the new street, as well as any special and peculiar damages which it sustained by the property's being made inaccessible for the carrying on of business during the progress of the work and by the machinery being injured by dust caused by the construction work.

In assessing damages suffered by a lessee of real estate by the abolition of a grade crossing of a railroad with a way, a provision in the lease giving to the lessee a right at any time during its term of ten years to purchase the premises leased at their fair value should not be taken into consideration either to enhance or to diminish the lessee's claim.

In assessing damages suffered by a lessee of real estate because of the extinguishment, in the abolishing of a grade crossing of a railroad with a way, of a private way granted to him from the leased premises to a cart path on remaining premises of the lessor leading to public streets by the building across it and between the leased premises and the cart path of a new street upon an embankment which rises from twenty-four to thirty-eight feet above them, the jury should give consideration to the question, whether, by the construction of suitable approaches at the former position of the private way granted to him, the new street could not have been used for all reasonable and necessary purposes of transportation or of travel during the remainder of the term of the lease.

By the provisions of a lease of land, the lessor granted to the lessee for a term of ten years a portion of a large tract owned by him and a right of way from the

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leased premises to a cart path on the premises which he retained, which led in both ways to public streets. In the course of the abolition of a grade crossing of a railroad with a way, a new street was constructed upon an embankment between and from twenty-four to thirty-eight feet above the premises leased and the cart path, entirely extinguishing the private way given in the lease. This new street was parallel to the cart path, but came to a dead end on the lessor's land. At the trial of a petition by the lessee for an assessment of damages suffered by him in the construction of the work of abolition, the presiding judge charged the jury that they might take into consideration the possibility or probability of the town's continuing a public street to the dead end of the street so left, and thus connecting the new street with the streets to which the cart path ran. *Held*, that the instruction was incorrect since it failed to direct the jury's attention to the fact that, unless the petitioner had some means of access to the new street, the extension of the new street to other streets of the town was of no benefit to him.

By the provisions of a lease of land, the lessor granted to the lessee for a term of ten years a portion of a large tract owned by him and a right of way from the leased premises to a cart path on the premises which he retained, which led in both ways to public streets. In the course of the abolition of a grade crossing of a railroad with a way, a new street was constructed upon an embankment between and from twenty-four to thirty-eight feet above the premises leased and the cart path, entirely extinguishing the private way given in the lease. This new street was parallel to the cart path, but came to a dead end on the lessor's land. Evidence was admitted on behalf of the respondent at the trial of a petition by the lessee for an assessment of damages suffered by him in the construction of the work of abolition, tending to show that the lessee had made no attempt to secure from the lessor a new right of way through the lessor's land to connect with the new street at a different point than the place where the former right of way existed. Under the lease the lessor could not be compelled to assign such right of way. *Held*, that the evidence wrongly was admitted.

A lessee of real estate, who has erected upon the leased premises a factory with machinery, some of which is fixed and some movable, and who, by the extinguishment, in the course of the abolition of a grade crossing of a railroad with a way, of a private way given him in his lease, is prevented from using his factory or moving the movable machinery, in a petition seeking the assessment of the damages suffered by such work, under R. L. c. 111, §§ 149–152, as amended by Sts. 1902, c. 440; 1905, c. 408, cannot recover for consequent decrease in the value of the movable tools, either directly, or indirectly by proof of its value in connection with the fixed machinery.

The damages suffered by one, who occupies land under a lease in accordance with the provisions of which he had been assigned a right of way which gave him access to a private way connecting with the public streets of a town, which right of way has been extinguished by the construction, in the course of the abolition of a grade crossing of a railroad with the private way, of a new street over it, built to take the place of the former private way, which damages, under R. L. c. 111, § 158, Sts. 1902, c. 440, § 8; 1905, c. 408, § 2, are to be assessed against the railroad company, are the entire damages suffered by the petitioner, not only those suffered within the railroad location.

PETITION, filed on March 19, 1906, for damages resulting to the petitioner from the discontinuance of a private way called

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Maple Street in Attleborough in the process of the abolition of a grade crossing of the respondent.

The case was tried before *Hardy*, J., together with another case by the same petitioner against the town of Attleborough, and six cases by Clarence L. Watson against this defendant and the town. It appeared that the petitioner was the lessee of premises shown on the accompanying plan from Clarence L. Watson. The term of the lease was ten years from April 2, 1900, and it was duly recorded. It contained a provision that the lessee or its successors or assigns should "have the right and option at any time during the continuation of this lease, to purchase said tract of land together with said rights of way," the price either to be agreed upon by the parties or to be determined by referees.

The provisions of the lease with regard to rights of way followed immediately after the description of the land leased and were as follows: "Together with a right of way of at least twelve feet in width from the northerly line of said lot to the cart path, which runs over said other land of said Watson about one hundred and fifty feet north of said northerly line of said tract, and to a point on said cart path within two hundred feet at least from said railroad land, and together with a right of way over said cart path or other equally convenient way to said river and across the same, and a right of way in continuation over land now or formerly of John W. and Oscar Wolfenden to County Street, the same as granted to said Watson and Fred A. Newell by deed from Richard D. Manchester, . . . or as otherwise possessed by said Watson or as appurtenant to said lands of said Watson or any part thereof. And together with a right of way over said cart path or equally convenient way across said railroad land to Maple street, the same as granted by said deed from said Manchester or as otherwise possessed by said Watson or as appurtenant to said lands of said Watson or any part thereof. Such rights of way to run with said land herein demised as appurtenant thereto, for use by travellers on foot, and with teams and vehicles of any description, but not to be exclusive, nor shall the rights of way herein demised prevent the said lessor, his heirs or assigns from demising or granting the same rights of way to the lessees or assigns of other parts of said lands of said Watson."

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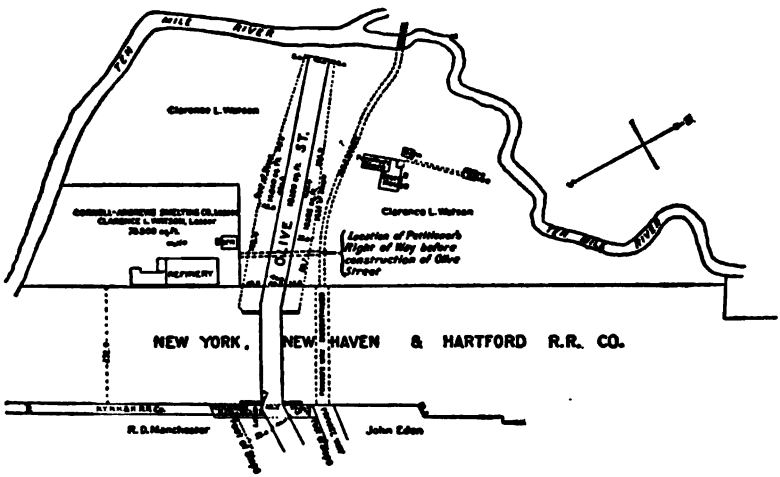
The "cart path," referred to in the above quoted portion of the lease and in the opinion, is marked "roadway" on the accompanying plan. Such "roadway," and the "private way dis-


TEN MILE RIVER
OLIVE ST.
Location of Petitioner's Right of Way before construction of Olive Street
NEW YORK, NEW HAVEN & HARTFORD R.R. CO.

continued" and the "private way," shown on the plan, formed Maple Street. The right of way provided for the petitioner in his lease is marked on the plan "Location of Petitioner's Right of Way before Construction of Olive Street." About six hundred feet from where Maple Street crossed Ten Mile River it joined with County Street, a town way. About four hundred feet from where it crossed the railroad it ran into South Main Street. Both County Street and South Main Street were parallel to the railroad. The only connection that the large tract of land shown on the plan had with the streets of the town was by means of Maple Street.

The final report of the commissioners appointed by the Superior Court in the proceedings for the abolition of the grade crossing, which was confirmed on July 2, 1904, determined that the Maple Street crossing should be abolished and Maple Street at that point discontinued, that a new crossing should be made and a new street called Olive Street Extension, crossing the railroad at an elevation, should be constructed as shown on the plan. Such construction discontinued entirely the petitioner's right of way. Nearest the railroad, Olive Street Extension was thirty-eight and one half feet above the land occupied by the petitioner.

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Opposite the northwest corner of that land it was elevated twenty-four and one half feet.

The actual entry to begin the work in accordance with the decree of abolition was made on the petitioner's premises in February, 1906. Inside of two weeks after this work was begun, access to the petitioner's lot was practically closed, but the plant was running until early in July, 1906. Olive Street Extension was not opened to travel until September, 1907, and at that time a new way constructed by the town from the end of Olive Street Extension across Ten Mile River to County Street was opened.

At the close of the evidence, the petitioner requested the presiding judge to make the following rulings, which were refused.:

"1. The petitioner is entitled to damages for the diminution in the market value of the petitioner's interest in the real estate.

"2. The jury in assessing damages may consider any loss to this petitioner's interest in the real estate arising from any of the following conditions, so far as it is found to exist: loss of opportunity to use spur track; lack of adaptability for manufacturing purposes; existence of embankment on the north and east side of the petitioner's property. . . .

"6 *b*. There is no evidence that at the time as of which the damages are to be assessed there was any probability that the Town of Attleborough would lay out a street in continuation of Olive Street Extension.

"6 *c*. The jury cannot consider any probability there may have been at the time as of which the damages are assessed that the Town of Attleborough would lay out a street in continuation of Olive Street Extension.

"7 *a*. Under the decree Olive Street Extension destroyed this petitioner's right of way to the north of Olive Street Extension.

"7 *b*. The jury may find that the construction of the Olive Street Extension under the decree destroyed the plaintiff's right of way to the north of Olive Street Extension.

"7 *c*. If the jury find that the lessor and the lessee either expressly or impliedly agreed upon the location of the twelve-foot way from the north line of the lessee's land to the cart path, then the location was fixed and neither of the parties had the right to change the location. . . .

"7 *e*. After the layout and construction of Olive Street Ex-

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tension the lessee had no right to alter the surface of the way on the lessor's land except for the ordinary repair of the way and could not construct an embankment on the lessor's land so as to reach the slope and street.

"7 *f*. The lessor was not bound to give a temporary way around the south side of Olive Street Extension to the lessee during the construction of the work.

"7 *g*. The lessor was not bound to give to the lessee a right of way along the lessor's land on the south side of Olive Street Extension up to the surface of Olive Street Extension.

"7 *h*. The words in the lease 'or other equally convenient way' do not mean a way equally convenient with the twelve-foot way from the north line of this petitioner's premises.

"7 *i*. The words in the lease 'or equally convenient way' do not mean a way equally convenient with the twelve-foot way from the north line of this petitioner's premises.

"7 *j*. This petitioner was not bound to ask the lessor for a convenient way out of its premises during the construction of the work.

"7 *k*. This petitioner was not bound to ask the lessor for a way out of its premises after the completion of the work.

"7 *l*. If the jury find that the lessor and the lessee either expressly or impliedly agreed that the cart path should be the way to the track and the way towards County Street, then the location of those ways was fixed and neither party had the right to change the location. . . .

"9. If the jury find that this petitioner had in its building machinery not fixtures, but necessary in working and using the machinery affixed to the land, the jury may consider the value of the said machinery which was not affixed, in determining the damage to the petitioner, if any, from loss of access to the streets of the town while the work under the decree was carried on."

Among other rulings, which the petitioner requested the presiding judge to make and which the bill of exceptions states "were given or no exception was taken to the refusal to give them," was the following: "10. In apportioning the damages between this petitioner and Mr. Watson the jury will give to this petitioner the diminution in the market value of its lease and the diminution in value of its buildings and fixtures."

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The presiding judge charged the jury in part as follows:

"By reason of the decree of the commission it is my duty to rule that, so far as the private rights of Mr. Watson were concerned in the way called Maple Street from the railroad location to the bridge over towards the Wolfenden property, his rights in that private way were not abolished. The rights of Mr. Wolfenden were not abolished so far as you find that they may exist from the deed. The rights of the Cornell-Andrews Company in that Maple Street Extension west of the railroad location were not discontinued so far as the company had any private right in that Maple Street Extension. The right that the Cornell-Andrews Corporation had in the way extending from the northerly line of the leased property to the cart path called Maple Street was not discontinued by that decree. So far as they had any private rights in that property previously to this decree of the commissioners those private rights still continue. . . .

"Now, perhaps I might as well deal with the question of what is called the dead-end here in this new way taken by the decree of July 2, 1904. . . . In connection with the taking of such land and in connection with the injury to the remaining land because of such taking, you are to take it as if that way were established for all time, so far as the taking was concerned. So far as the taking is concerned, you are not at liberty to take into consideration the probability that there would in the future be a further taking by the public authorities for the extension of that way over the river to County Street. . . .

"There was considerable evidence introduced about the value of this plant [of the Cornell-Andrews Smelting Company]. These petitions are maintained for damages to the real estate, not for damages that may have been incurred by the parties because some contract was interfered with or because the business was interfered with as business. The statute does not imply that business losses are to be considered by you so far as the interference with the use of personal property is concerned or so far as the interference with certain contracts is concerned. . . . The question here is, What was the injury to the use and occupation of that realty, or that property attached to the realty, because of interference with its rights of access? And that applies

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not only to the suit against the Providence Railroad Company but also the rights against the town of Attleborough.

"Now, in dealing with the question of the attachments to the real estate, I do not know that I need to spend much time upon that. The matter of option may be of some importance as showing what was the intention of the parties when this machinery was attached to the realty. Was it the intention of both parties that it should be made a part of the realty? An option attached to the lease may be of importance to show that there was an intention on the part of the lessee when he had put it there perhaps to buy at the end of the term upon an agreed sum and it would become a part of the realty, that the sum that he paid perhaps would be less because of the attachments that he had made to the realty. That may be considered by you as bearing upon the question of intention. Did it become a fixture because there was an intention on the part of the lessee to remain there for a long time, to use the property, perhaps to buy it? But so far as an option attached to the lease is concerned with reference to any interference with that as a matter of damages or a claim for damages, you have no right to consider that as bearing upon the amount of damages that ought to be recovered in this case, because the interference with contracts between the parties is not to be considered, the interference with the personal property is not to be considered; that is excluded from your consideration. It is only the question of the value of the use and occupation, and the impairment of the value of that use and occupation by reason of any interference with such use and occupation. . . .

"As I have already said, that decree of July 2, 1904, abolishing the private crossing over the railroad location, did not extinguish the rights of the Cornell-Andrews Company to the private way that existed from the northern boundary of its land to the old way called Maple Street, called the cart path in the lease. It did not abolish it. Up to the time that there was an entry upon the land by the town for the purpose of constructing a new way, it had the same right to use that way that it had before. Now in establishing the way over the premises, over this private right of way, the company still had the right to approach the public street that way provided it could do so by adapting that way to the new grade of the street, and when its officers or agents ar-

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rived upon the surface of the new way, it had the right to cross it and had the right to pass off the new way over the limits of the old way to the cart path or Maple Street. I rule that as a matter of law, because I have already explained to you that where a public way is established over land, the fee still remains in the owner, and if there is a private right of way, the right of way still exists for the purpose of approach to the limits of the public way, and you have the right to consider in the light of that law what interference there was with the accessibility to the old cart path at that time and what could have been done in connection with the approach to the new way. . . .

"We are dealing here with the contract, a contract in the form of a lease, and as I view that contract it appears to me the proper construction is that there was an alternative right here to be considered by the jury as well as by the parties themselves in connection with the right of way. That is, if there was an interference on the part of Mr. Watson in connection with that use of the way, if he desired to change it in the future, [he agreed in the lease] that he would afford an equally convenient right of way for the Cornell-Andrews Company to the outer world, the Wolfenden bridge; that he would afford it either way, that is, on the way to the crossing and on the way to the Wolfenden bridge; and it is my duty, I think, to instruct you as a matter of law that under this interference that may have existed here with the rights of access to the Cornell-Andrews Company, that the company would have the right to call upon Mr. Watson to afford an equally convenient way by which access could have been obtained to outside property, and it is for you to say as a question of fact what would be an equally convenient right of way. If you find that there was no convenient right of way that could be obtained in accordance with my instructions, then that leaves the petitioner, the Cornell-Andrews Company, in a condition to approach you and ask you what would be the damages under those circumstances, what would be fair and reasonable compensation for the loss of the use and occupation because that way could not be obtained. . . . Now if you find upon all the evidence in this case that that reasonably convenient way could be afforded the Cornell-Andrews Company, it is my duty to instruct you that Mr. Watson under the contract would be obliged

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to grant it, and under the contract it would be the duty of the petitioner, the Cornell-Andrews Company, to apply for it. . . ."

In one of the petitions by Watson against the Town of Attleborough, and in one of his petitions against the defendant in this case the jury found for the petitioner, and verdicts were directed for the respondents in the remaining four petitions brought by him.

In the petition of *Cornell-Andrews Smelting Company* v. *Town of Attleborough*, the jury returned a verdict for the petitioner for $5,842.72, which verdict was set aside by the presiding judge.

In this case, the jury found for the petitioner in the sum of $583.47; and the petitioner alleged exceptions.

J. W. Cummings, (*C. R. Cummings* with him,) for the petitioner.

J. L. Hall, for the respondent.

BRALEY, J. The petitioner, which held a lease of a part of the premises, and the landowner having severally brought suits against the respondent and the town to recover damages caused to their respective estates by the discontinuance of a private way at a grade crossing and by the taking of land for a public way, laid out and built pursuant to the decree, the cases were tried together in accordance with the provisions of R. L. c. 48, §§ 20, 23. The joinder for the convenience of trial, however, having worked no change in the statutory liability of the respondents, which remained several and not joint, each party was privileged under R. L. c. 176, § 29, to challenge four jurors without assigning any cause. *Stone* v. *Segur*, 11 Allen, 568, 570.

If a reference to the evidence, rulings and instructions in the other cases is necessarily contained in the exceptions, the only remaining questions before us relate to the petitioner's title and the measure of damages recoverable against the railroad corporation.

The petitioner's estate having consisted of the land described in the lease, with the rights of way referred to as appurtenant, it becomes important to ascertain the location of the passageway leading from the demised premises to the cart path. The cart path, with the connecting way on the west, being in existence at the date of the lease, is referred to without further description, but the passageway providing the only roadway from the leased

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premises is described as starting from the northerly line of the lot with a width at least of twelve feet, and thence running over other land of the lessor to the cart path about one hundred and fifty feet distant, which it was to join at a point within two hundred feet from land of the railroad abutting on the east. The termini and maximum width having been fixed, with the choice conferred on the lessee of determining at what point within the two hundred feet the passageway should take its departure, the subsequent location by user, in which the jury could find the lessor had acquiesced, operated as a definite assignment from which without his consent there could be no deviation. *George* v. *Cox*, 114 Mass. 382. *Stetson* v. *Curtis*, 119 Mass. 266. *Lipsky* v. *Heller*, 199 Mass. 310, 318. *Bass* v. *Edwards*, 126 Mass. 445.

In the enjoyment of the leasehold, after reaching the cart path the petitioner could proceed to a highway either on the west by crossing the bridge over the river as the most convenient route, or on the east over the railroad at grade.

It was within the authority of the commissioners to prescribe what alterations were necessary to do away with the crossing, and their decree is declared by the statute to constitute a taking of whatever land or other property they decide may be required to carry out the changes. R. L. c. 111, § 152, as amended by the Sts. of 1902, c. 440, § 3.* By the scope of the decree a permanent public easement in the entire area within the defined layout of the street with the accompanying slopes was taken. *Doon* v. *Natick*, 171 Mass. 228. But if the fee remained in the lessor, the passageway, or outlet, being within the metes and bounds, even if not specifically named, was discontinued and extinguished when the work had been entered upon. *Central Wharf* v. *India Wharf*, 123 Mass. 567, 570. *Googins* v. *Boston & Albany Railroad*, 155 Mass. 505. *Doon* v. *Natick*, 171 Mass. 228. *Scholefield* v. *Boston & Maine Railroad*, 173 Mass. 387, 390. *Lancy* v. *Boston*, 186 Mass. 128, 133. The street as constructed having rendered the use of the same level in transit impossible by the extreme difference in grade, an essential element of the private easement had been destroyed, and there remained no concurrent use not incon-

* See also St. 1905, c. 408, § 2.

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sistent with the rights of the public, which the petitioner might exercise, as in *Clark* v. *Worcester*, 125 Mass. 226, 231. See also *Denniston* v. *Clark*, 125 Mass. 216, 221; and *Como* v. *Worcester*, 177 Mass. 543.

After extinguishment of the way, the lessee possessed no enabling rights under the lease to require the lessor to assign another way connecting the leasehold with the cart path. The covenant to assign equally convenient ways refers to ways then in existence to which specific reference is made, and a way by necessity did not arise, even if the jury found that by the course of events the petitioner, having been left in a *cul de sac* with the opening closed, was for a period cut off from any available method of ingress and egress necessary for the commercial use of its estate. A way of this nature comes into existence at the time of a grant which has omitted to provide access to the estate conveyed. *Oliver* v. *Pitman*, 98 Mass. 46. *Morse* v. *Benson*, 151 Mass. 440. And it is only when a way is obstructed, or closed by the acts of the owner of the servient estate, that the owner of the dominant estate may depart from the located way and pass over other portions of the land. *Leonard* v. *Leonard*, 2 Allen, 543. Upon the establishment of the passageway the petitioner obtained an uninterrupted line of communication, which as between itself, the lessor, and the railroad corporation formed an indivisible easement. The leasehold accordingly should be considered as abutting on a continuous way, whose location was clearly defined, and could not be changed without a reassignment. *Killion* v. *Kelley*, 120 Mass. 47, 52.

The rulings requested and refused as to the scope of the petitioner's appurtenant rights and the effect of the decree, as well as the instructions to the jury to which the petitioner excepted, were erroneous.

Inasmuch as there must be a new trial at which the questions may again arise, we take up the exceptions to the rulings and instructions as to damages.

The eviction not having been caused by the acts of the lessor, there had been no breach of the covenant for quiet enjoyment, as the lessee's occupation of the premises was subject to the exercise of the right of eminent domain. *Weeks* v. *Grace*, 194 Mass. 296, 298. The lessee's remedy therefore is under the provisions

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of R. L. c. 111, § 153, as amended by St. 1902, c. 440, § 2. The freehold and leasehold being incommensurate, and no part of the reversion having been taken, if as to this respondent damages in gross were awarded for injury to the entire tract caused by the closing of the cart path at the crossing, the apportionment to the lessee would not measure the damages suffered in the extinguishment of the passageway in which the lessor had no inherent interest. If to avoid this objection the course pursued at the trial is followed, and for the assessment of damages the freehold is treated as severable, even then the injury to the reversion does not differ in kind from the injury to the remaining land, as the lessor made no claim that the buildings and fixed machinery formed a part of his estate. The rule of apportionment under R. L. c. 48, § 20, where there are leasehold interests, even if held applicable in *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 187 Mass. 45, 50, to proceedings for the abolition of grade crossings, does not deprive a lessee from recovering compensation independently of the lessor, if a settlement has been made with him, or where the damages to the leasehold are distinct and separate from those suffered by the landowner. *Pegler* v. *Hyde Park*, 176 Mass. 101, 103. *Galeano* v. *Boston*, 195 Mass. 64. See *Harris* v. *Howes*, 75 Maine, 436.

But while the damages to the leasehold should have been assessed separately, no exceptions were taken to the instructions which seem to have been in conformity with the tenth request. By the verdict in his favor, however, which apparently has not been set aside, the lessor, having received compensation for injury to the reversion, has ceased to have any pecuniary interest in the present action, and no question of apportionment will arise at the second trial. It will then be open under the allegations in the petition for the petitioner to recover the difference between the fair market value of the leasehold, including the improvements, as of the date of the decree, and its value as left after the building of the street to its westerly end, with the elevation of the bed of the railroad at the easterly end, cutting off the use of the spur track. It also can recover any special and peculiar damages which have been sustained, so far as the property was rendered inaccessible for the carrying on of business during the progress of the work, together with any

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injury affecting the use of the machinery, arising from the deposition of dust coming from the street while in process of construction. *Drury* v. *Midland Railroad*, 127 Mass. 571. *Lawrence* v. *Boston*, 119 Mass. 126. *Pennsylvania Railroad* v. *Ebry*, 107 Penn. St. 166. *Edmands* v. *Boston*, 108 Mass. 535. *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386. *Putnam* v. *Boston & Providence Railroad*, 182 Mass. 351. *Munn* v. *Boston*, 183 Mass. 421. *Sheehan* v. *Fall River*, 187 Mass. 356, 361. *Hyde* v. *Fall River*, 189 Mass. 439. *Galeano* v. *Boston*, 195 Mass. 64.

The value of the lessee's option of purchase, provided for in the lease, can neither enhance nor diminish the petitioner's claim, as damages are assessed for injury to its interest as of the date of the taking. *Pegler* v. *Hyde Park*, *ubi supra*.

In determining whether to an appreciable degree there had been any permanent depreciation, the jury should take into consideration whether, after completion at the westerly end as called for by the decree, the street, by the construction of suitable approaches at the passageway where it opened on the leasehold, could have been used for all reasonable and necessary purposes of transportation or of travel during the remainder of the term, and also whether a connection with the railroad was not still feasible.

While the ruling requested, that the probability of the town's laying out a continuation of the street could not be taken into consideration, was properly refused, and the jury correctly were instructed to consider whether the town ultimately would extend it across the river to the highway on the westerly side, their attention also should have been directed to the limitation, that unless the petitioner could reach the street by building an approach at the passageway, it would derive no benefit by the extension. *Como* v. *Worcester*, 177 Mass. 543. *Heald* v. *Kennard*, 180 Mass. 521, 523.

But neither during its construction at any stage, nor after completion did the lessee have the right to build an embankment or approach on the lessor's land, or to enter upon his premises to pass around the completed west end, either to gain access to the street or to reach the cart path. *Killion* v. *Kelley*, 120 Mass. 47, 52. Both were bound by the terms of the lease,

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which as we have said conferred no alternative rights as to the passageway.

The petitioner undoubtedly was required to make use of every reasonable means to obtain access to the cart path or to the street, and damages could not be enhanced by its inactivity, but until some proof appeared that such an effort was practicable, a failure to make the attempt would not diminish damages actually suffered. The evidence that either of these methods could have been adopted, or that the lessor had not offered a way in substitution, was wrongly admitted.

The petitioner, while permitted to show the value of the fixed machinery, was not allowed to introduce evidence of the decreased value of the necessary movable tools and appliances used in its business. But under our decisions there could be no recovery for injury to this class of property, even if by closing the passageway its removal had been made practically impossible during the period of construction. Nor could this be accomplished indirectly by proof of its valuation in connection with the fixed machinery, to be used as an element of computation in determining the damage caused by loss of access. The exclusion of this evidence and the refusal to rule that its value in any form could be recovered was correct, and the instructions given were appropriate. *Edmands* v. *Boston*, 108 Mass. 535. *Sawyer* v. *Commonwealth*, 182 Mass. 245. *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386. *Bailey* v. *Boston & Providence Railroad*, 182 Mass. 587. *Boston Belting Co.* v. *Boston*, 183 Mass. 254.

It remains to determine whether the respondent is liable in the first instance for the petitioner's entire damages, or whether the damages are separable, to be assessed partly against the town and partly against the railroad. The crossing was a private way for which the street was built strictly in substitution, and the statute on which the decree rests makes provision for but one public work, without any distinction as to the relative importance of one part over another, in the adjustment necessarily required for the separation of grades. *Farwell* v. *Boston*, 180 Mass. 433. *Davis* v. *County Commissioners*, 153 Mass. 218, 227. The railroad is primarily to pay for all damages "which may be sustained by any person in his property," where

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the discontinuance is of a private way. R. L. c. 111, § 153. St. 1902, c. 440, § 3. St. 1905, c. 408, § 2. If the railroad is to be held responsible only for the discontinuance of the portion within its location, the injury is the same in kind, even if the damages must differ in amount, from those caused by the extinguishment of that portion of the way within the limits of the street. It is obvious that, when the passageway affording the only available means of entrance and exit had been extinguished, the petitioner would not have suffered any larger injury if the street had been laid out wholly within the confines of the cart path, for the discontinuance of which the respondent would then have been answerable. But in estimating damages the same result follows for, upon the appropriation of a part at each end leaving the intervening portion inaccessible, a complete discontinuance of the whole of the way from the northerly line of the leasehold had been worked. *Webster* v. *Lowell*, 142 Mass. 324, 338.

We are of opinion that the instructions which in substance restricted the liability of the respondent to the discontinuance of the portion of the cart path at the crossing were incorrect, and the jury should have been instructed that the petitioner's entire damages were to be assessed against the railroad corporation, with interest from the time when possession was taken for the purposes of construction. R. L. c. 48, § 13.

Exceptions sustained.

ALFRED QUIMBY & others *vs.* GILBERT A. TAPLEY & another.

Suffolk. March 16, 1909. — June 24, 1909.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Objections to master's report, Exceptions to master's report. *Rules of Court*, Equity Rule 31. *Trust*, Powers of trustee. *Voluntary Association.*

Where in a suit in equity no special order of the court has been made, exceptions to a master's report which are founded on objections filed with the master more than five days after a notice, given by him to the parties or counsel under Equity Rule 31, that he had finally settled the draft of his report, should be dismissed.

In a suit in equity for an accounting, it appeared that the defendants were trustees of a voluntary unincorporated association of which the plaintiffs were

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members, and as such trustees were in possession of certain land and funds, that the purpose of the association as stated in its by-laws was "managing and improving certain lands and buildings located in Scituate;" that the association grew out of a reorganization of a former association, and among the property conveyed to the new organization at the time of the reorganization was certain hotel property upon which the defendants subsequently expended money which the plaintiffs contended was expended wrongly because the former association had obtained possession of the property through receiving a mortgage of it to secure a loan of money advanced to the mortgagor, and subsequently receiving from the mortgagor a release of the equity of redemption, acts which, the plaintiffs contended, were outside of the former association's by-laws. It appeared that the mortgagor, before mortgaging it, had purchased the property from the former association. *Held*, that it was immaterial whether or not the former association acted within its powers in acquiring the property in question, since it was properly property of the new organization, and therefore was property which the defendants under the by-laws were to manage and improve, and upon which therefore they could expend money of the association.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on January 20, 1905, for an accounting, as stated in the opinion.

The case was referred to James D. Colt, Esquire, as master. Exceptions to his report were overruled and the bill was dismissed by *Rugg*, J. The plaintiffs appealed.

V. J. Loring, (*J. P. Sylvia, Jr.*, with him,) for the plaintiffs.

W. H. Niles, (*E. S. Underwood* with him,) for the defendants.

LORING, J. This is a bill in equity brought by three holders of certificates in a voluntary association known as the Fourth Cliff and Humarock Beach Company, and the executors of two deceased certificate holders, in behalf of themselves and all other holders of certificates who should thereafter join therein, against two trustees of the company for an account of their receipts and expenditures while trustees.

The two trustees were Gilbert A. Tapley and Nahum T. Greenwood. Tapley became a trustee on January 19, 1888, and Greenwood on March 18, 1895.

1. The objections on which the exceptions taken by the plaintiffs were founded were not filed within five days after notice given by the master as provided by the thirty-first chancery rule, and no special order has been made by the court allowing them. They should have been dismissed, not overruled.

2. The remaining question is whether on the facts found by the master with such inferences as can be made from those facts

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by the court (see *French* v. *Hall*, 198 Mass. 147; *Rosenberg* v. *Schraer*, 200 Mass. 218), the bill should be dismissed.

The sole contention of the plaintiffs is that all sums received and expended by the trustees on a certain hotel were outside the purposes for which the association was organized.

The voluntary association here in question was the reorganization of a former company. This reorganization was made at a meeting of the old company on the same day that the defendant Tapley was made a trustee, January 19, 1888.

The by-laws of the new company provided that the purpose of it was "managing and improving certain lands and buildings located in Scituate." "The land purchased by this association shall be held in trust by three trustees who shall act under the instructions of a majority in interest of said company as expressed by their votes at any meeting duly called and holden."

The master found that "when Gilbert A. Tapley became trustee there came into his hands the land originally conveyed to the company, — with the exception of the many lots sold during the first two or three years of its existence, — the hotel, an old farmhouse, a bowling alley, a skating rink, a stable, and the bridge to the main land."

The ground for the plaintiffs' contention that this hotel was outside the purposes for which the company's money could be spent is this: The master found that the hotel was built by one Hamblin in 1882, on land then owned by him. That the deed by which the land of the new company was conveyed to its trustees in 1890 was the same as that by which the land of the old company was conveyed to its trustees in 1882. Their argument is that this land never was conveyed to the trustees of the new company and so was not a part of the property of the company on which money could be expended by its trustees.

The exact terms of the two trust deeds are not set forth in the master's report, nor does the report contain a description of the land on which the hotel was built. But it is there stated that the land on which Hamblin built the hotel was "purchased by him from the company." If it was, it must have been contained in the original deed of 1882 to the trustees of the old company. It was found by the master that the deed of 1890 covered "the property originally conveyed to the company in

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1882, with the exception of sixty-one lots that had been sold in the meantime." If the hotel stood in the name of the trustees of the old company in 1890 (the date of the deed from the trustees of the old company to the trustees of the new company), it passed to the trustees of the new company unless it was included in the sixty-one lots mentioned above. It is plain that the title to the hotel stood in the trustees of the old company at that time. Hamblin mortgaged the hotel to the trustees of the old company on November 1, 1882, and released the equity to them on April 26, 1884; and the master found, "in this manner the hotel property was acquired by the company," meaning the old company. We infer that the land on which the hotel stood was not among the sixty-one lots found in the deed to the trustees in 1882 but not in the deed of 1890, because the master found that the hotel was included in the property which came into the defendant Tapley's hands when he became trustee.

The difficulty with the plaintiffs' argument is that they start by showing that the original mortgage loan by the old company to Hamblin to enable him to build the hotel was beyond the powers of the old company and so was beyond the powers of the new company. Whether this mortgage loan was beyond the powers of the old company or not is of no consequence. It does not appear how the old company was reorganized and the new company created. This suit is by certificate holders in the new company. We infer that the hotel was a part of the property of the new company, and under its by-laws the new company was to manage and improve all its property.

As we have said, the exceptions to the master's report should have been dismissed in place of being overruled, and the decree dismissing the bill should be modified accordingly. The defendants are entitled to their costs in this court. So modified the decree is

Affirmed.

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1. A motorman in the general employ of a street railway company, who at his request is excused from duty during the morning of a certain day, an extra man being put in his place, with the arrangement that he shall run an extra car in the afternoon or find a substitute to do so, after he is thus excused and before he has found a substitute for the afternoon, is not an employee of the company within the meaning of the employers' liability act, and if he goes into a telephone booth in a waiting room at a station of the company, where he afterwards is found dead, the circumstance that, when killed, he may have been using or intending to use the telephone in completing arrangements to be relieved from duty in the afternoon, even if it is a fact instead of a pure conjecture, does not make him an employee of the company, because the making of an arrangement for a substitute or finding out whether an extra car was to be run that afternoon would be for himself and not in behalf of the company. *Gooch* v. *Citizens Electric Street Railway*, 254.
2. At the trial of an action for personal injuries received by the plaintiff from driving upon a pile of loose dirt negligently left in a public way by the driver of a dump cart, there was evidence tending to show that when he thus left the dirt the driver of the dump cart was engaged in hauling dirt which the defendant was taking from an excavation, and was subject to the defendant's orders as to whither he should take it, that the team he was using was owned by a person who employed and paid him and from whom for a stipulated price the defendant hired the team with the driver, and that the owner gave the driver no directions from the time when he drove the team to the defendant's work until he returned. *Held*,

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Agency (*continued*).

that the inferences which should be drawn from the evidence as to the relations of the driver of the dump cart and the owner of the team and the defendant were not matters of law but questions of fact to be decided by the jury under suitable instructions; and that they were warranted in finding that the driver while hauling the dirt was acting solely as the servant of the defendant. *Cain* v. *Hugh Nawn Contracting Co.* 237.

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3. If, while the driver of a dump cart is hauling dirt to a destination designated by his employer along a public way, the dirt is dumped into the way either by a deliberate act of the driver or because of a defect in the cart, which is not owned by the employer, and the driver then fails to take the dirt to the destination designated, but negligently leaves it in the way, such negligent act of the driver is within the scope of his employment, and his employer is liable for injuries resulting therefrom to one lawfully travelling upon the way. *Cain* v. *Hugh Nawn Contracting Co.* 237.

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Ratification of Acts of Agent.

Ratification of acts of treasurer of savings bank with regard to placing loan and requiring security, see SAVINGS BANK, 1.

Principal's Liability to Agent.

Bill in equity by trustee in bankruptcy of insurance agent against insurance company for accounting and commissions on renewal premiums, which was dismissed because commissions were held not to be due since agent had violated terms of contract of employment, see CONTRACT, 14.

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Actions by employees against employers for personal injuries received in course of employment, see NEGLIGENCE, 3–23.

ANIMAL.

Action under R. L. c. 102, § 146, for double damages resulting from injuries due to plaintiff's being bitten by dog, see DOG, 1.

APPEAL.

In actions at common law, see ATTORNEY AT LAW, 2.
In suits in equity, see EQUITY PLEADING AND PRACTICE, 6.
In probate, see PROBATE COURT, 6–8; EXECUTOR AND ADMINISTRATOR, 2, 6, 7.

ARCHITECT.

Action by contractor for value of labor and materials which he had furnished in construction of building and which he and the owner had thought were being furnished under building contract, but where there was no contract because of fraud of architect, see CONTRACT, 12, 13.

ASSAULT AND BATTERY.

Action by passenger for alleged assault and battery and unlawful expulsion from ship, where defendant sought to justify action by showing that plaintiff was suffering from trachoma, see SHIP, 1–6.

ASSIGNMENT.

Consideration.

Evidence that money, paid by employee of transportation company to make good to company amount of freight charges on goods which employee had, but should not have, delivered to consignee without charges being paid, and paid with understanding that for it company should execute and deliver to employee assignment of claim against consignee, held to warrant finding that money was received, not as payment of debt of consignee, but as consideration for agreement to execute and deliver assignment afterward delivered, see PAYMENT, 1.

Validity.

1. An assignment of life insurance policies made to the trustees to be named in the will of the assignor, for the sole use and benefit of the assignor's wife, who has assented to this provision for her benefit, is of no effect unless it is executed and attested as a will, because it cannot take effect until after the death of the assignor and does not create a present trust. *Frost* v. *Frost*, 100.

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2. The provision of R. L. c. 118, § 73, that "every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall enure to her separate use and benefit, and to that of her children," has no application to an assignment of a life insurance policy purporting to be made to the trustees to be named in the will of the assignor, for the sole use and benefit of the wife of the assignor, because such an attempted assignment is of no effect, so that the policy never has been legally assigned for the benefit of the wife or in any way legally made payable to her. *Frost* v. *Frost*, 100.

Validity of assignment to savings bank of first mortgage on real estate on which bank took second mortgage, a lien intervening between first and second mortgage, and consequent rights of bank as assignee of mortgagee of first mortgage, see SAVINGS BANK, 2; MORTGAGE, 1, 2.

Construction of Instrument of Assignment.

3. In an assignment made to "the trustees to be named in my will" the phrase "my will" must be held to mean the document finally admitted to probate as the will of the assignor. *Frost* v. *Frost*, 100.

Rights of Assignee of Chose against Assignor's Debtor.

4. In an action against a landowner on an order in writing, drawn by a contractor and accepted by the defendant as payable "from any amount due" the contractor "on final payment" under a contract for the construction of a building, if it appears that the contractor in good faith has performed his contract in substance, and, although there have been some unessential variations from the letter of the contract, he would be entitled to recover from the landowner on a *quantum meruit* the value of his work and materials to an amount not exceeding the contract price reduced by the amount of damage suffered by the landowner on account of the contractor's departure from a strict performance, the plaintiff as the holder of the order can recover this amount. *Buttrick Lumber Co.* v. *Collins*, 413.

5. In an action on an order in writing payable to the plaintiff drawn upon the defendant by a contractor who was engaged in constructing a building on the defendant's land, it appeared that the order was payable from any amount due to the contractor on the final payment under his contract with the defendant, and that this order was accepted in writing by the defendant before the completion of the work under the contract. There was evidence on which it could have been found that afterwards the contractor fully performed his contract, or that his work, although differing in some unimportant particulars from the specifications of the contract, was accepted by the defendant as a complete performance of it. It further appeared that, when the building could have been found to have been completed and the time for the final payment had arrived, the defendant owed the contractor

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a sum of money more than sufficient to satisfy the plaintiff's order, and that thereupon the contractor and the defendant made a settlement, by which the contractor released the defendant from all liability to him, and accepted in return a payment of $100 and a promise of the defendant to assume and pay all bills of persons having liens upon the building. *Held*, that the case was for the jury, and that, upon the jury finding that the contractor had performed his contract and was entitled to a final payment more than sufficient to cover the amount of the plaintiff's order or assignment accepted by the defendant, the plaintiff was entitled to recover that amount in full, the subsequent release by the contractor, to which the plaintiff was not a party, having no effect to discharge or revoke the assignment of the fund to the plaintiff, and the defendant having no right, after his acceptance of the order, to reduce the amount coming to the plaintiff out of the final payment, by diverting the fund to the payment of liens which he had agreed to assume and discharge for his own benefit. *Buttrick Lumber Co.* v. *Collins*, 413.

6. In an action to recover the amount due to a contractor upon an architect's certificate under a contract with the defendant for the construction of a building, brought by an assignee of the contractor under an assignment in writing, of which the defendant received notice, the defendant may recoup any damages which he has suffered before the date of the writ from the breach and abandonment of the contract by the plaintiff's assignor, although at the time that the defendant received notice of the assignment the full amount named in the certificate was due and payable to the plaintiff and at that time the plaintiff's assignor had committed no breach of the contract. *American Bridge Co.* v. *Boston*, 374.

Of Insurance Policy.

Assignment by husband to wife of paid up endowment life insurance policy under St. 1894, c. 522, § 73, is good against trustee in bankruptcy of husband, who was appointed subsequent to assignment, although when assignment was made husband was deeply insolvent and known to be so by both husband and wife; and that statute is not unconstitutional, see BANKRUPTCY, 1, 2, 4.

But money paid by insolvent person as premiums on insurance policy on his life as gift for benefit of third person is money paid in fraud of creditors, although third person is wife, see BANKRUPTCY, 4, 5.

Necessary parties to suit in equity to recover such premiums, see BANKRUPTCY, 6.

Rights of wife as beneficiary of policies when issued and as assignee of policies after issue, as compared with rights of other beneficiaries, see BANKRUPTCY, 3.

Action in his own Name by Assignee of Chose.

7. In order that the assignee of a chose in action may maintain an action thereon in his own name under R. L. c. 173, § 4, the assignment must have been executed and delivered before the date of the writ. *Bowen* v. *New York Central & Hudson River Railroad*, 263.

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ATTORNEY AT LAW.

Scope of Authority.

1. The decision reported in Vietor *v.* Spalding, 199 Mass. 52, to the effect that an attorney at law who is retained generally by a client but, at the time of his receiving notice of the dissolution of a partnership with which his client has business dealings, is not acting on behalf of his client in any matter, has no authority to receive such notice on behalf of his client, affirmed. *Vietor* v. *Spalding*, 234.

Liability for Misappropriation of Client's Property.

2. A petition, filed in the Superior Court, alleging that an attorney at law, who was a member of the bar of the Commonwealth, while acting as attorney for the petitioner had collected $8,000 due to the petitioner and had failed to pay it over to him because, as he admitted, he had lost it in speculation on his own account, and that the attorney had promised to pay the petitioner $5,000 of that amount but had failed to keep his promise to do so, and praying for an "order and decree" that the attorney should pay to the petitioner $5,000 and interest and costs and, in default thereof, that he should "be punished according to law as in such cases made and provided, and for such other and further relief as" the court might "deem just and proper," is a proceeding upon the law side of the court, and upon an appeal from an order dismissing the petition questions of discretion cannot be considered. *Goss Printing Press Co.* v. *Todd*, 185.
3. A petition in the Superior Court, which alleges that an attorney at law, who was a member of the bar of the Commonwealth, while acting as attorney for the petitioner collected $8,000 due to the petitioner and failed to pay it over to him because, as he admitted, he had lost it in speculation on his own account, and that the attorney promised the petitioner to pay him $5,000 of that amount but failed to keep his promise, and which prays for an "order and decree" that the attorney shall pay to the petitioner $5,000 and interest and costs and, in default thereof, that he shall "be punished according to law as in such cases made and provided, and for such other and further relief as" the court may "deem just and proper," is not recognized by the statutes as an authorized proceeding for the collection of such a debt, and, while the court, as a part of its power of regulation of the conduct of its own officers, might make an order for the payment into court of money collected by an attorney and not paid over, and might punish the attorney for contempt if he disobeyed the order, the making of such an order would be an exercise of discretion, from a refusal to exercise which no appeal lies. *Ibid.*

Privileged Communication.

Letter sent by person adjudged insane to member of bar appointed receiver of his property is not privileged communication from client to counsel, see INSANE PERSON, 1.

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AUTOMOBILE.

Registration.

1. By the provisions of St. 1903, c. 473, as amended by St. 1905, c. 311, regarding the registering of automobiles and the licensing of operators thereof, the Legislature created a duty on the part of persons owning or operating automobiles toward other travellers upon the highways, and therefore one who owns and operates upon the highway an automobile not registered as required by those statutes is a trespasser and other travellers upon the highway owe him no duty excepting to refrain from injuring him by acts done with a wanton or reckless disregard of consequences. *Dudley* v. *Northampton Street Railway*, 443.

2. A resident of Connecticut, who during sixteen days has been operating an automobile on the highways of this Commonwealth, except for a part of a day when he drove it to West Suffield, Connecticut, and the daytime of another day when he drove it to Brattleborough, Vermont, to attend a fair, and a day and a half when the machine was in a garage in this Commonwealth undergoing repairs, has operated an automobile on the roads and highways of this Commonwealth for a period exceeding fifteen days, within the meaning of St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, and therefore, although he may have complied with the laws of Connecticut relating to motor vehicles, if he has not complied with the requirements of St. 1903, c. 473, and acts in amendment thereof, he is a trespasser upon the highway. *Ibid.*

3. *Whether* St. 1903, c. 473, § 1, as amended by St. 1905, c. 311, § 2, providing that no person shall operate in this Commonwealth an automobile or motor cycle upon any public highway or private way laid out under authority of statute, unless he has been licensed and his vehicle registered as required by the statutes, except that "any automobile or motor cycle owned by a non-resident of this State who has complied with the laws relative to motor vehicles and the operation thereof of the State in which he resides may be operated by such owner on the roads and highways for a period not exceeding fifteen days without the license" should be interpreted as giving to such non-resident owners merely one period of fifteen days after once coming into this Commonwealth before being forbidden to operate their machines here without a license, and as allowing only one total period of grace during the whole license year, or *whether* it should be construed more liberally by allowing non-resident owners to operate their cars without a license for a period of not more than fifteen days upon any and every occasion when they shall come into this Commonwealth, here was not decided. *Ibid.*

BAILMENT.

1. The bailee of a chattel which is destroyed by the negligence of another may maintain an action for the loss of his special property in it, and, with the consent of the general owner, he may recover the full value of the chattel. *Bowen* v. *New York Central & Hudson River Railroad*, 263.

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BALLOT.

What is "official ballot," see NATICK, 2.

BANK AND BANKER.

Cashier's Check.

Cashier's check is not cash and does not satisfy requirement as to deposit at foreclosure sale, see CONTRACT, 17.

BANKRUPTCY.

Assignment of Paid up Insurance Policy by Insolvent Husband to Wife.

1. The provision of St. 1894, c. 522, § 73, re-enacted in substance in R. L. c. 118, § 73, by which, as interpreted by this court, an assignment of a paid up endowment life insurance policy by a husband to his wife, made when the husband is deeply insolvent, and which except for the statute would have been in fraud of creditors, is good against the trustee in bankruptcy of the husband's estate, is not unconstitutional as creating an unreasonable exemption of property unlimited in amount. *Bailey* v. *Wood*, 549.
2. St. 1894, c. 522, § 73, re-enacted in substance in R. L. c. 118, § 73, contains the following provision: "Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of this section relating to premiums paid in fraud of creditors." *Held*, that this statute applies to and includes an assignment by a husband to his wife of a paid up endowment life insurance policy, and that such an assignment, made when the assignor is deeply insolvent and is known to be so both by himself and his wife and followed by the bankruptcy of the assignor, is good against the trustee in bankruptcy of his estate by virtue of the statute, although the facts may be such that except for the statute the assignment would be in fraud of his creditors. *Ibid.*
3. Under R. L. c. 118, § 73, the right of a wife to the proceeds of insurance upon the life of her husband extends, not only to policies which are payable to her or for her benefit when issued, but also to those which, after issue, are assigned to or in any way made payable to her, while the right of any other beneficiary, as against creditors of the insured, is confined to policies expressed to be for his benefit at the time of their issue. *Bailey* v. *Wood*, 562.
4. Under R. L. c. 118, § 73, the trustee in bankruptcy of the estate of one, who while insolvent assigned insurance policies on his life to his wife and

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paid premiums thereon while insolvent, has no claim upon the proceeds of such policies except for the amount of premiums paid by the bankrupt while insolvent, and § 70 of the bankruptcy act of 1898, in regard to the surrender value of policies payable to the bankrupt or his personal representatives, has no application, where it does not appear that the amount of premiums paid in fraud of creditors exceeds the surrender value. *Bailey* v. *Wood*, 562.

Premiums paid by Husband upon Insurance Policy assigned to Wife.

5. Under the provisions of R. L. c. 118, § 73, money paid by an insolvent person as premiums on an insurance policy on his life, as a gift for the benefit of a third person, is money paid in fraud of creditors, which with interest thereon inures to their benefit from the proceeds of the policy, and the same rule applies where the third person is the wife of the insured. *Bailey* v. *Wood*, 562.
6. In a suit in equity by a trustee in bankruptcy of the estate of one, who while insolvent assigned insurance policies on his life to his wife and paid premiums thereon while insolvent, to obtain from the proceeds of the policies the amount of insurance premiums thus paid in fraud of creditors, the insurance companies which issued the policies are not necessary parties, and the plaintiff either may join them as defendants or may protect himself by giving to the companies notices in writing as provided in R. L. c. 118, § 73. *Ibid.*

Fraudulent Conveyance by Bankrupt.

7. A life and endowment policy of insurance, known as a "fifteen-year policy," was taken out by a man upon his own life, and was made payable to him or to his estate. Afterwards the insured assigned the policy to his sister, then unmarried and a member of his family. She died, without having married, and her beneficial interest in the policy passed to the insured as her sole next of kin. Shortly afterwards, the insured, who later was adjudged a bankrupt, being then the sole owner of the policy, and knowing at the time that he was insolvent, made a voluntary conveyance of it to his daughter. The transfer was effected by changing the policy so that it read for "the benefit of his daughter M. absolutely in any and every event whether the policy becomes a claim by reason of his death or by maturity, provided only that she survive him." Later the policy matured in the lifetime of the insured, and his daughter collected the full amount of it, which was $5,000, and this sum "was received and used by her for her own purposes." The trustee in bankruptcy of the estate of the insured brought a suit in equity against the daughter to recover for the benefit of creditors the amount received by her under the policy. *Held*, that in substance the transaction was an assignment and was a transfer by the bankrupt to his daughter of a valuable asset as a gift; that the daughter was given no right as against creditors by the provisions of R. L. c. 118, § 73, because the policy was not made for her benefit when it was issued; therefore that the transfer was void as against the creditors of the bankrupt, and that the plaintiff as trustee in bank-

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ruptcy was entitled to the proceeds of the policy and to an accounting by the defendant for the money which she had received. And, *it seems*, that, even if the policy had been made originally in the form to which it was changed at the time of the transfer, the plaintiff still might have maintained his bill, because, as the transfer to the daughter was contingent on her surviving her father, the bankrupt still would have a contingent interest in the proceeds of the policy which, as against his creditors, he could not give away. *Bailey* v. *Wood*, 562.

BICYCLE.

Action against street railway company by person travelling on highway on bicycle for injuries caused by his falling into trench in street negligently left unguarded by defendant, see NEGLIGENCE, 29, 30.

BILLS AND NOTES.

Action for conversion of promissory note, see CONVERSION, 1.

BOND.

Of Contractor with Commonwealth under R. L. c. 6, § 77.

1. Under the provision of R. L. c. 6, § 77, that "officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents, a sworn statement of his claim, within sixty days after the completion of the work," the "completion of the work" from which the period of sixty days is to be reckoned is the completion of the public work for the construction of which the contract was made, and the section does not require the filing of a statement of each claim for labor or materials within sixty days after the last of such labor or materials is furnished by the claimant. *Sampson Co.* v. *Commonwealth*, 326.

Suit in equity for enforcement of liability of surety on such bond and determination of questions as to whether certain payments were within provisions thereof, see EQUITY JURISDICTION, 3–8.

Of Executor or Administrator.

Petition for leave to bring suit upon official bond of administrator which was denied because breach, if any, was but technical, see EXECUTOR AND ADMINISTRATOR, 2.

Scire facias against executrix, who also was residuary legatee and had given bond to pay debts and legacies of testator, for amount of judgment in action founded on fraud of testator while in fiduciary relation to plain-

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tiff, where plaintiff claimed waste by executrix; and action on bond, see EXECUTOR AND ADMINISTRATOR, 8–5.

Replevin Bond.

Effect of, see REPLEVIN, 1, 4.

Technical Breach.

See EXECUTOR AND ADMINISTRATOR, 2.

BOSTON.

Taking by Boston under St. 1846, c. 167, of waters of Long Pond and of water rights appertaining thereto included certain rights of grantees from Natick Indians, see LAKE COCHITUATE, 1.

Order of board of aldermen of Boston, purporting to give to new telephone company rights in all present and future streets for maintenance of telephone system not yet inaugurated, held to be attempt at granting franchise, and therefore void, see MUNICIPAL CORPORATIONS, 1, 2.

BOSTON AND PROVIDENCE RAILROAD CORPORATION.

1. In 1888 the Boston and Providence Railroad Corporation leased all of its property to the Old Colony Railroad Company for ninety-nine years, the lease containing provisions that the lessee was to make all "permanent improvements on said railroads and property at its own expense" and at the end of the term of the lease was to return the demised property to the lessor with all permanent improvements thereon, and that the lessee might request from the lessor a conveyance to persons designated by the lessee of real estate owned by the lessor which was outside of its location and not required by the lessee for railroad purposes, and that the money received for such conveyances should be received by the lessee and be applied by it to additions to the railroad other than improvements, which should "thereupon become the property of the lessor, and subject to the provisions" of the lease. In 1893 the Old Colony Railroad Company made a lease for ninety-nine years of all its property, including its rights under the above lease, to the New York, New Haven, and Hartford Railroad Company, which succeeded to the rights and became subject to the obligations of the Old Colony Railroad Company under the first mentioned lease. By St. 1896, c. 516, §§ 9–20, the Boston and Providence Railroad Corporation was ordered to discontinue the use of certain of its land in Boston for railroad purposes, to build a new station on Dartmouth Street and to extend its road to the South Terminal station. By a deed in which all three of the foregoing railroad companies joined, the Boston and Providence Railroad Corporation sold and conveyed to the New York New Haven, and Hartford Railroad Company "for one dollar and other valuable considerations" all of the land which the Legislature had ordered it to discontinue using for railroad purposes, and the New York, New Haven, and Hartford Railroad Company agreed that it would assume the

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burden of all suits against the Boston and Providence Railroad Corporation growing out of the extension of its railroad to the South Terminal station and would defend or settle or pay the judgments in all such suits without cost to the Boston and Providence Railroad Corporation. The deed was executed by the president of the Boston and Providence Railroad Corporation acting under authority conferred upon him by the board of directors. *Held*, that the condition imposed by St. 1896, c. 516, §§ 9–20, was a new condition not contemplated by the parties to the leases, that the conveyance appeared to be made for an adequate consideration, and that it was within the powers of the directors of the grantor corporation. *Little* v. *Old Colony Railroad*, 277.

BOSTON AND WORCESTER STREET RAILWAY COMPANY.

Petition for damages resulting from maintenance of temporary trestle and cars thereon in street in front of petitioner's land by Boston and Worcester Street Railway Company, see DAMAGES, 5.

BROKER.

Indictment and trial of broker for larceny in having obtained by false pretenses, embezzled, and converted property of customers, see PLEADING, CRIMINAL, 5; LARCENY, 1–3.

CARRIER.

Of Freight.

Stoppage *in transitu*.

Right of consignor to stop goods in transit held to have been lost, because shipment of consignor finished, see SALE, 1.

Of Passengers.

Action by passenger for alleged unlawful expulsion from ship, where defendant sought to justify expulsion by showing that plaintiff was suffering from trachoma, see SHIP, 1–6.

Actions by passengers for injuries alleged to have been due to negligence chargeable to street railway and to railroad companies, see NEGLIGENCE, 24–27, 31.

CHARITY.

Administration Cy Pres.

1. The will of a testatrix contained the following residuary clause: "The residue of my estate, real and personal, I give, bequeath and devise, for the purpose of founding a Kindergarten Home for Deaf Children, to be located on the old estate owned by me — to be founded strictly on the family system, the object being to prepare a limited number of young

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children to enter under favorable circumstances, those institutions where the deaf are taught to speak by lip movements." The "old estate" referred to was the place in the town of Wellesley in which the testatrix had lived all her life. After her death the main part of the house was injured by fire so as to be uninhabitable, and it would cost $4,000 or $5,000, if not more, to make it fit for occupancy as a kindergarten for deaf children. Besides the "old estate," the residue left to the trust amounted to about $20,000, and, after such an expenditure as would be necessary to put the estate in a proper condition for use, the balance in the hands of the trustees would not be enough to maintain the institution for any considerable length of time. Upon a bill for instructions filed by the trustees under the will, a single justice found that it was "altogether problematical and uncertain how much money would be required and how long it would take to accumulate the necessary funds." The single justice also found that the Sarah Fuller Home for Little Deaf Children was situated in West Medford, about fourteen or fifteen miles from Wellesley; that it had been established about twenty years and that its objects and principles were the same in all respects as those which the testatrix had in mind in founding a Kindergarten Home on her estate in Wellesley; that it took a limited number of children and adopted the family system. He found also that the testatrix was familiar with and interested in its work and that her purpose in founding a Kindergarten Home on her estate was to have the same sort of work done there as was done in the institution at West Medford. The executive committee of the Sarah Fuller Home had expressed by vote a willingness to take over the fund in the hands of the petitioning trustees and the proceeds of the real estate that might be sold, and to administer in connection with the Home the charity created by the testatrix. The Sarah Fuller Home was the only institution of the kind in the Commonwealth. *Held*, that the trustees should not be instructed to hold the fund for accumulation; that, since the founding of a new home was impracticable for lack of money to maintain it, it was within the general intent of the testatrix to apply the gift to the support and maintenance of such children in another home, furnishing the same advantages, in a place so near as to accommodate the same class of persons, and it was ordered that the charity should be administered in accordance with the doctrine of *cy pres*, through the Sarah Fuller Home, under a scheme to be approved by a single justice. *Ely* v. *Attorney General*, 545.

CHARLES RIVER BASIN.

1. The owners of flats in the Charles River Basin, theretofore bare at low tide and valuable in furnishing sand and gravel for sale, were deprived of no property by the erection of the dam authorized by St. 1903, c. 465, as amended by St. 1906, c. 402, maintaining the water over the flats at a permanent depth of eight feet. *Crocker* v. *Champlin*, 437.
2. The proprietors of land upon the Charles River Basin in Boston, who under St. 1850, c. 317, became owners in fee to the sea wall, did not

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acquire by that or other statutes any rights beyond those of ordinary riparian proprietors on a navigable river where the tide ebbs and flows. *Home for Aged Women* v. *Commonwealth*, 422.

3. The change in the Charles River authorized by St. 1903, c. 465, as amended by St. 1906, c. 402, was for the improvement of navigation as well as for other useful purposes, and the fact that this was one of the purposes of the Legislature was enough to warrant the legislation and the action under it, even if such a change in the river could not have been authorized for the other useful purposes alone without providing compensation for riparian proprietors. *Ibid.*

4. In St. 1903, c. 465, as amended by St. 1906, c. 402, relating to the Charles River Basin, providing for the creation of a dam sufficiently high to hold back all tides and to maintain in the basin a substantially permanent water level not less than eight feet above Boston base, also for a suitable lock to be built not less than three hundred and fifty feet in length between the gates, forty feet in width and thirteen feet below Boston base in depth, with a suitable bridge or drawbridges, and authorizing also the filling of a strip of land outside the sea wall, the building of a new wall or embankment and the taking of the intervening land for a public park, the various works authorized were treated by the Legislature as parts of a single project for the public good, the building of the embankment and the construction of the park being natural if not necessary incidents of the change in the level of the water. *Ibid.*

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

1. Under St. 1904, c. 314, as modified by St. 1905, c. 243, one who duly is enrolled in the classified list of the civil service of the Commonwealth, before he can be removed by his superior officer, is entitled, if he requests it in writing, to a full and proper hearing in the nature of a trial. *McCarthy* v. *Emerson*, 352.

2. Where, upon being notified by his superior officer that he was indefinitely suspended, one, who duly was enrolled in the classified list of the civil service of the Commonwealth, requested in writing that he be given a hearing on the charges against him according to St. 1904, c. 314, as modified by St. 1905, c. 243, and upon a day set by his superior officer attends before him for that purpose, but, when he requests his superior officer to furnish him with information and to produce for him the testimony in support of the charge and specifications against him and letters from him to the department upon which certain specifications are based, such requests are refused, and he is not allowed to be sworn, he is not given such a hearing as the statute requires, and, upon his petition after his removal following such proceedings, a peremptory writ of mandamus reinstating him will be issued. *Ibid.*

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Vote by precincts as to acceptance of provisions of St. 1900, c. 133, with regard to extension of civil service law to police and fire forces of town of Natick was held not to have been acceptance of act by town "at an annual town meeting or at any town meeting duly called for the purpose," see NATICK, 1.

COAL HOLE.

See NEGLIGENCE, 47, 48.

COLONIAL ORDINANCE OF 1647.

Rights of Commonwealth to which owner of flats acquired under Colonial Ordinance of 1647, are subject, see FLATS, 1.

COMMONWEALTH.

Under St. 1902, c. 272, § 1, officers designated by city council of Worcester to act regarding removal and placing underground of wires in streets, are officers of Commonwealth and not agents of city, see WORCESTER, 1.

Suit in equity to enforce liability of surety on bond given under R. L. c. 6, § 77, as security for payment by contractor for labor performed or furnished and for materials used in construction of public work under contract with Commonwealth, see EQUITY JURISDICTION, 3–8; BOND, 1.

Rights of Commonwealth to which owner of flats, acquired under Colonial Ordinance of 1647, and riparian owners on Charles River Basin are subject, see RIPARIAN OWNER, 1; FLATS, 1.

CONDUCT OF TRIAL.

In action at law, see PRACTICE, CIVIL, 2, 3, 10; LANDLORD AND TENANT, 6.

In criminal cases, see PRACTICE, CRIMINAL, 1; WITNESS, 2.

In probate appeal cases, PROBATE COURT, 3–5.

CONFLICT OF LAWS.

Action against stockholder in foreign corporation, who resides in the Commonwealth, to enforce liability under statute of foreign State cannot be maintained if State of incorporation provided no remedy for enforcement of statutory liability outside of that State, see CORPORATION, 2.

CONSPIRACY.

Action for breach of contract to purchase real estate, where it was alleged that plaintiff was prevented from selling because of collusive acts of defendant and others in preventing him from purchasing land at foreclosure sale in order to perfect his title, see CONTRACT, 17.

CONSTITUTIONAL LAW.

Constitutionality and effect upon rights of riparian owners of St. 1903, c. 465, as amended by St. 1906, c. 402, for improvement of Charles River Basin, see CHARLES RIVER BASIN, 1–4; RIPARIAN OWNER, 1.

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St. 1894, c. 522, § 78, regarding assignment by insolvent husband to his wife of paid up endowment life insurance policy, is not unconstitutional, see BANKRUPTCY, 1.

It is not violation of constitutional right of respondent, in petition for appointment of guardian for him as insane person, for the presiding justice, on application of petitioner, to compel him to testify, see INSANE PERSON, 2.

CONSTRUCTION.

Of instrument of assignment, see ASSIGNMENT, 3.

Of wills, see DEVISE AND LEGACY, 1–4; EXECUTOR AND ADMINISTRATOR, 7; CHARITY, 1; TRUST, 1–3.

Of contracts, see CONTRACT, 4–7; NEGLIGENCE, 55.

Of instrument of insurance, see INSURANCE, 1, 3–5.

Of lease as to private way, see WAY, 1.

Of trusts, see TRUST, 1–3.

CONTRACT.

What constitutes.

1. The following offer was made by one corporation to another and was accepted by the corporation to which it was addressed: "Gentlemen: — I am authorized by our board of directors to offer you the sum of $100,000 for your property on Camden Street in Boston which we are now occupying on a lease, the terms to be as follows: $5,000 cash when signing papers, $5,000 cash on delivery of the deed, remainder to remain on mortgages, you to take a second mortgage with interest at 5% and arrange for renewal of first mortgage or extension of it until it can be placed for a term of years, you to pay a sufficient sum on the first mortgage in order to get it extended, payments to be arranged so that we shall pay you the sum of $11,000 per year, you to pay interest on the mortgages and taxes and the balance to be applied to the purchase price of the property, you to pay the insurance up to the time it is transferred to us, also the taxes for the year 1903." *Held*, that the offer was not a mere preliminary proposal, but with its acceptance constituted a contract which fixed the rights of the parties, and that it contained a sufficiently definite and certain statement of all the essential terms which the parties then intended to introduce into their contract, and consequently was not too indefinite to be the foundation of a final agreement. *Beach & Clarridge Co.* v. *American Steam Gauge & Valve Manuf. Co.* 177.

2. At the trial of an action for an alleged breach by the defendant of a contract by which the plaintiff was to do certain work upon a building as a subcontractor under the defendant, the alleged breach being a refusal of the defendant to permit the plaintiff to carry out the contract, it appeared that a certain person on or about August 20 had submitted to the defendant a bid for the performance of the work, and, after conversation with the architect, had signed on September 29 an agreement in writing to reduce

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his bid a certain percentage, and to "put up a bond of 33% of" his contract, that on November 20 such person made an assignment for the benefit of his creditors to the plaintiff who continued the business with the assignor as manager, that on December 1 the plaintiff signed with the defendant the contract declared on, which was dated September 29, in which there was no mention of a bond or of the agreement of the plaintiff's assignor dated September 29, but in which the price fixed upon was the amount of the original bill less the reduction agreed upon on September 29 by the plaintiff's assignor. The plaintiff testified that nothing had been said to him about a bond before the execution of the contract declared on. The plaintiff's assignor testified that shortly after he made the agreement of September 29 he might have told the architect that he was getting a bond fixed up and that it would be ready in a day or two. *Held*, that the questions whether there ever was an agreement that the giving of a bond should be a condition precedent to the contract becoming of binding force, and whether, if there ever was such an agreement, it had been waived, were for the jury. *Stebbins* v. *Conners Bros. Construction Co.* 153.

Consideration.

3. A promise to pay for services which already have been performed is without consideration. *Conant* v. *Evans*, 34.

Construction.

4. A so called strike clause in a contract for the delivery of certain coal during a period named, stipulating that the seller shall not be responsible for the delivery of the coal "if prevented by strikes or combinations of miners," relieves the seller from his obligation to deliver to the buyer during a strike of miners more than the buyer's due proportion of the supplies of coal which the seller has on hand or has reason to anticipate that he can obtain by the exercise of proper effort, but a strike during the period fixed for delivery has no effect to extend such period beyond the time limited by the contract. *Metropolitan Coal Co.* v. *Billings*, 457.

5. In an action of contract it appeared that by an agreement in writing the plaintiff agreed to buy of the defendant one thousand dollars' worth of the stock of a certain company, and the defendant agreed to repurchase the stock at the end of one year for the sum of $1,000, if the plaintiff so desired, and guaranteed to pay him "dividends amounting to not less than eight per cent per annum on the above one thousand dollars' worth of stock." The plaintiff received the stock and did not exercise his right to call upon the defendant to purchase it at the end of a year. He received dividends upon the stock at the rate of eight per cent per annum for one year and two months, and after that received no dividends whatever. He brought the action on the guaranty to recover the amount of $80 a year for the period that had elapsed since the payment of dividends had ceased. The judge, who heard the case without a jury, found for the defendant and gave judgment for him. Upon an appeal by the plaintiff, it was *held*, that the judgment should be affirmed; that, if the guaranty should be

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construed as running for a reasonable time, it would be difficult to say as matter of law that a finding that a reasonable time had elapsed at the end of fourteen months was wrong, but that the more reasonable construction of the agreement was that the guaranty was intended to be limited to the year to which the obligation to repurchase was limited, and therefore that all the dividends which were guaranteed had been paid. *Tilton* v. *Whittemore*, 89.

6. In an action for the alleged breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, a corporation which then was putting up some new buildings, to crush the rock to certain specified sizes and deliver the crushed rock as therein specified, it appeared that the defendant undertook to terminate the contract as soon as the buildings were completed but before the whole of the ledge was removed, and prevented further performance on the part of the plaintiff, contending that under the contract the plaintiff was to crush only so much of the ledge as should be needed in the construction of the new buildings and that it had a right to terminate the contract as it did. The contract, among other things, contained the following: "That whereas the owner desires to secure the removal of a certain ledge . . . of rock situated upon its premises . . . and whereas the contractor desires to undertake and carry on such work of removal . . . Now, therefore, . . . One. The contractor undertakes and agrees, subject to the provisions hereof and to the directions of the engineer in charge, to excavate and remove the ledge . . . Five. The owner shall furnish at convenient central points about the ledge . . . the necessary power . . . Six. . . . the contractor shall thoroughly wash and cleanse the ledge before the same is blasted or excavated . . . The owner is thoroughly to strip the earth and soil from the ledge as rapidly as is required." It further was provided that the "excavation and removal shall be to grade thirteen or such other grade as may be specifically designated by the said engineer," and a provision was made for "changing the grade to which the ledge or any portion thereof shall be levelled." It further was provided that "The contractor shall use the chips and loose stones not crushed in filling up hollows in the ledge caused by the work of excavation, to the end that upon the completion of the work the ledge shall be substantially at the grade or grades designated." The only reference in the contract to buildings in process of construction was a provision that if work upon the building was suspended by strikes the engineer might order the prosecution of work under the contract suspended. *Held*, that the contract was one for the removal of the entire ledge, and that the defendant had no right to terminate the contract upon the completion of its buildings. *Gaffey* v. *United Shoe Machinery Co.* 48.

7. In an action for the alleged breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, the contract contained a provision that the "excavation and removal shall be to grade thirteen or such other grade as may be specifically designated" by the defendant's engineer. There was a further provision that "The engineer in charge may at any time during

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the progress of the work give written notice to the contractor, as hereinbefore provided, changing the grade to which the ledge or any portion thereof shall be levelled, and the grade so designated shall be in substitution of the grade thirteen mentioned in this instrument." The defendant's engineer gave to the plaintiff a notice, purporting to be under this clause, that thereafter the grades would be eighteen and twenty-three instead of thirteen. The plaintiff refused to acquiesce in this change on the ground that it was not warranted by the contract, and thereupon the defendant virtually put a stop to the work and prevented the plaintiff from completing it. An auditor to whom the case was referred found that the effect of the change of the grade from thirteen to eighteen and twenty-three was that only a small amount would be excavated from the top of the ledge, and that the change was made by direction of an officer of the defendant for the purpose of terminating the plaintiff's work. At the trial the defendant's engineer testified on cross-examination that "he did not know of any purpose to which the tops of the ledges levelled off to grade twenty-three and grade eighteen could be put" and that his object in changing the grade was to stop the plaintiff from working further. The presiding judge instructed the jury that "The engineer under the terms of the contract . . . was authorized to make any change of grade incidental to the purpose of carrying out the provisions of the contract, — that is, for the purpose of taking away the ledge, — but he had no authority . . . to change the grade to an impracticable grade for the purpose, and simply for the purpose, of terminating the contract." On exceptions alleged by the defendant after a verdict for the plaintiff, it was *held*, that the instruction of the judge was correct; that, by the only reasonable construction of the provision of the contract, the defendant's power to change the grade did not include the power to change it so as to abrogate the contract, but gave the defendant authority to make only such reasonable changes as would render the removal of the ledge when completed more satisfactory to it. *Gaffey* v. *United Shoe Machinery Co.* 48.

Construction of certificates and policies of insurance, see INSURANCE, 1, 3-5.

Construction of contract between stevedore and owner of ship which, it was contended, relieved owner from liability to employee of stevedore resulting from defect in hatch of ship, see NEGLIGENCE, 55.

Implied.

In fact.

8. Where, at the trial of an action of contract to recover compensation for services performed, in which the answer contains a general denial, the defendant admits that the services were performed at his request and that he owes the plaintiff whatever the services were reasonably worth, the plaintiff is not obliged to be content with these admissions but has a right to introduce evidence both as to the defendant's liability and as to the amount which the plaintiff is entitled to recover. *Conant* v. *Evans*, 34.

9. In an action of contract to recover $1,000 for performing a surgical operation, in which the answer contained a general denial, the defendant

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admitted that the operation was performed at his request and also admitted that he owed the plaintiff whatever his services were reasonably worth. It appeared that there was no agreement as to compensation before the operation was performed, but that after the operation the plaintiff sent the defendant a bill for $1,000, and that a correspondence followed in which the defendant, although saying that he thought the charge was very high, repeatedly said in substance in his letters that he would pay the bill as soon as he could spare the money. The judge ordered a verdict for the plaintiff in the full amount claimed, and the defendant alleged exceptions. *Held*, that the statements of the defendant in his letters were competent evidence not only upon the question of liability but also in regard to the amount to be paid, and were not rendered incompetent by the defendant's admissions that the operation was performed at his request and that he owed the plaintiff whatever his services were reasonably worth, but that the admissions of the defendant and the statements in his letters were not conclusive either in regard to his liability or the amount to be recovered, and, it not having appeared that the plaintiff had done anything or had refrained from doing any thing in reliance upon such admissions or statements, the defendant was not estopped to contest his liability or the amount to which the plaintiff was entitled; therefore, that the question what the services of the plaintiff reasonably were worth should have been left to the jury and the ordering of the verdict was erroneous. *Conant* v. *Evans*, 34.

10. In an action by the owner of a patent, against a corporation, on an agreement implied in fact to pay to the plaintiff royalties on machines made and sold by the defendant as being covered by the plaintiff's patent although they were not covered by it, it was not denied by the defendant that for a time an agreement to pay such royalties might be inferred or implied from its conduct, but it contended that such implied agreement had been terminated by a notice given by the defendant to the plaintiff that it was not using the plaintiff's patent and did not intend to pay any further royalties upon the machines it was making and selling. There was evidence of the giving of such a notice, but there also was evidence that after the time when the notice was said to have been given and up to the date of the writ the defendant's machines continued to be marked, advertised and sold as patented under the plaintiff's patent. *Held*, that, although the defendant could at any time have terminated the arrangement under which it was paying royalties to the plaintiff to which without such arrangement the plaintiff would have had no claim, yet it was a question for the jury whether the notice was given, and the fact that the defendant continued to mark, advertise and sell its machines as made under the plaintiff's patent was some evidence that it regarded the previous arrangement as still in force, so that it was right for the presiding judge to leave to the jury the question whether the arrangement by which the defendant agreed to pay royalties to the plaintiff was in force during the whole period up to the date of the writ, even if a finding that it was in force during the whole period would be greatly against the weight of the evidence. *Strong* v. *Carver Cotton Gin Co.* 209.

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In law.

11. At the trial of an action by an administrator for money had and received by the defendant from the deceased person, the plaintiff introduced in evidence interrogatories which he had propounded to the defendant under R. L. c. 173, § 57, and the defendant's answers thereto, from which it appeared that the defendant had received from the deceased person both money and orders upon banks for money which he cashed during the lifetime of the deceased person, but the defendant did not state in his answers why or under what circumstances he received them. Without there being any evidence that the deceased person intended the money to be either a gift to the defendant or a payment to him in satisfaction of a debt, the defendant rested at the close of the plaintiff's evidence, and the presiding judge ordered a verdict for him. *Held*, that the verdict should not have been ordered, since there was evidence from which the jury might have found that the money was received by the defendant to the use of the deceased person. *Devlin* v. *Houghton*, 75.

12. Where, through a mutual honest mistake of the parties to a supposed contract for the construction of a building by one of them upon the land of the other, the building is erected in good faith without any express contract having been made between them, he who furnished the labor and materials at the request of the landowner may recover from him their fair market value, irrespective of the value which the erection of the building has or has not added to the land. *Vickery* v. *Ritchie*, 247.

13. A fraudulent architect prepared an instrument purporting to be a contract in duplicate between the owner of a lot of land and a contractor for the construction of a Turkish bath house on the land. By means of a fraudulent shifting of typewritten sheets the instrument, when signed by the contractor, named as the contract price about $38,500 and, when signed by the landowner, named as the contract price about $23,000. The instrument finally delivered to the contractor named the larger figure and that delivered to the owner the smaller one. The architect made all the payments for the owner and by repeated fraudulent representations prevented a discovery of the discrepancy between the two writings until the building was substantially completed. The contractor and the owner each acted honestly and in good faith, relying on the statements of the architect. The owner paid the price named in the instrument held by him, and the contractor sued him for a balance of about $10,500 alleged to be due to him. An auditor found that the market value of the labor and materials furnished by the plaintiff was $33,499 and that their total cost to the plaintiff was $32,950. He found also that the land and building had cost the defendant much more than their market value, and that the increase of the market value of the land by the structure which the plaintiff had put upon it was only $22,000. *Held*, that the plaintiff and the defendant were mistaken in supposing that they had made a contract for the construction of the building, because their minds never met, but that, the labor and materials having been furnished to the defendant at his request, and such request in legal effect not being limited to the

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amount of $23,000 which he thought was the price that he had agreed to pay for the completed building, the plaintiff could recover on a *quantum meruit* the fair value of the labor and materials thus furnished, and the fact that the increase in the value of the defendant's property from the construction of the building was about $11,500 less than the value of the labor and materials furnished by the plaintiff had no effect upon the amount to be recovered. Gillis *v.* Cobe, 177 Mass. 590, discussed and distinguished. *Vickery* v. *Ritchie*, 247.

Action of contract between respective personal representatives of man and of woman for money alleged to have been procured from man by woman through her falsely representing herself to have been divorced from former husband, see FRAUD, 1–3.

Action by assignee of contractor in building contract against owner to recover whatever was due contractor at time of assignment, where assignee, although he could not recover on contract because of small breaches, was allowed to recover what might have been due in action on *quantum meruit*, see ASSIGNMENT, 4.

Building Contract.

Action by assignee of contractor in building contract against owner to recover whatever was due contractor at time of assignment, where assignee, although he could not recover on contract because of small breaches, was allowed to recover what might have been due in action on *quantum meruit*, see ASSIGNMENT, 4, 5.

Action by contractor for value of labor and materials furnished in construction of building, where owner and contractor honestly had thought they were bound by contract but, through fraud of architect, they were not so bound, and where amount already paid by owner exceeded amount which building had added to land, but was less than value of labor and materials furnished by plaintiff, see *ante*, 12, 13.

Performance and Breach.

14. A master, to whom was referred a suit in equity by the trustee in bankruptcy of an insurance agent against an insurance company to recover the amount alleged to be due to the agent under a contract in writing between the agent and the company as a percentage of renewal premiums paid to the defendant on policies procured by the agent before his adjudication as a bankrupt, which was in March of a certain year, found that one of the provisions of the contract between the agent and the defendant was that, if the agent, "during the maturity of renewals provided in this agreement shall engage in the life insurance business for any other company" in a certain territory, "all renewals which would otherwise accrue thereafter shall be forfeited to the" company, and that, after October 17 of the same year as that in which the agent was adjudicated a bankrupt, "the agent placed no insurance with the defendant company, but did place insurance with other insurance companies without the defendant's consent." He made no finding that any renewal premiums were paid to the defendant

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between March and October. The bill was dismissed and the plaintiff appealed. *Held*, that the bill rightly was dismissed, since it did not appear that anything was due to the agent, whose trustee the plaintiff was, before October 17, and it did appear that after that date nothing was due because the agent engaged "in the life insurance business for" another company. *Herrick* v. *New York Ins. Co.* 478.

15. Where by a contract in writing made on May 22, 1902, a coal dealer agreed to deliver before November 1 of that year an amount of coal sufficient to fill the bins in a certain building with furnace and stove coal to their full capacity, and the contract contained a condition that the seller should not be responsible for the delivery "if prevented by strikes or combinations of miners," and from the middle of May, 1902, until November 26, 1902, a strike of miners in the coal mines of Pennsylvania wholly interrupted the ordinary supplies of coal of the dealer, but he had on hand at all times during the period of the contract quantities of coal of the proper grades equal to or greater than the amounts called for by this contract and was equipped with teaming and transportation facilities sufficient for the delivery of such coal at the premises of the buyer, it was *held*, that the contract of the seller toward the buyer was performed in full, if during the strike the seller apportioned all his available supplies of coal among his regular customers and those persons with whom he had contracts when his contract with the buyer was made and gave to each his fair and proportionate share of the seller's available supplies, and if he delivered to the buyer during the period covered by the contract his fair and proportionate share of such supplies. *Metropolitan Coal Co.* v. *Billings*, 457.

16. By a contract in writing made on May 22, 1902, a coal dealer agreed to deliver before November 1 of that year an amount of coal sufficient to fill the bins in a certain building. The contract contained a condition that the seller should not be responsible for the delivery "if prevented by strikes or combinations of miners." From the middle of May, 1902, until November 26, 1902, a strike of miners in the coal mines of Pennsylvania wholly interrupted the ordinary supplies of coal of the dealer, but during the period covered by the contract he apportioned all his available supplies of coal among his regular customers and those persons with whom he had previous contracts and gave to each, including the buyer under the contract in question, his fair and proportionate share of the seller's available supplies. On October 31, 1902, the seller notified the buyer that for all coal delivered after November 1, 1902, he should charge the buyer the market price. He did so, and, on the buyer refusing to pay such price, brought an action to recover it. *Held*, that, if, after receiving the notice from the plaintiff, the defendant ordered coal that was delivered after November 1, he was liable for the market price, although he intended that such coal should be treated as delivered under the contract, because the obligation of the plaintiff to deliver under the contract terminated on November 1, and he had performed his whole duty under the contract up to that time, the strike, which did not terminate until after the termination of the contract, having excused him from delivering to the defendant more

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than his proportional share of the plaintiff's coal on hand. *Metropolitan Coal Co.* v. *Billings*, 457.

17. In an action for the breach of a contract to buy from the plaintiff for $100,000 certain real estate, which was subject to a mortgage, the plaintiff alleged that the defendant by conspiracy and combination with the mortgagee made it impossible for the plaintiff to perform his contract. It appeared that the mortgagee refused to extend the mortgage and proceeded to a foreclosure under a power of sale contained in the mortgage, that by the terms of the sale a deposit of $5,000 was required, that the attorney for the plaintiff was the highest bidder and the property was knocked down to him for $65,000, but that he failed to deposit $5,000 in cash and offered instead a cashier's check for that amount, which the auctioneer after consultation with the attorney for the mortgagee refused to accept, that the attorney for the mortgagee was mistrustful in regard to the validity of the check because it had been issued for several weeks and had been used at an injunction trial two weeks before, that the attorney for the plaintiff asked for a suspension of the sale for fifteen or twenty minutes to enable him to get the money on the check, saying that he could get the money at the bank and return within that time, and there was evidence that he could have done so. Thereupon the property was put up again and the only bidders were the attorney for the mortgagee and the attorney for the defendant, and the property was sold to the attorney for the defendant for $60,400, and the attorney for the defendant immediately deposited $5,000 in cash with the auctioneer. *Held*, that the evidence would not warrant a finding that there was any conspiracy between the defendant and the mortgagee to deprive the plaintiff of his rights or disable him from performing his contract, that the defendant had a right to bid at the sale and to acquire the property in the manner that he did for a smaller price than that stipulated in his agreement with the plaintiff, that the mortgagee's attorney and the auctioneer had a right to refuse to receive a cashier's check instead of actual money, especially under the circumstances, and also had a right to refuse to give the plaintiff's attorney time to procure the money on the check. Whether the facts could be made the ground of a bill of equity to avoid the sale was not before the court. *Beach & Clarridge Co.* v. *American Steam Gauge & Valve Manuf. Co.* 177.

Breach of contract for purchase of property which caused only nominal damage to seller, see DAMAGES, 1.

Action of contract where questions whether, on facts, condition to be performed by plaintiff precedent to performance by defendant existed, or had been waived, were for jury, see *ante*, 2.

Action for breach of contract by plaintiff for excavation of rock from ledge and removal of ledge, crushing of rock and delivery of crushed rock for work being done by defendant, involving questions of construction of contract and measure of damages, see *ante*, 6, 7; DAMAGES, 2.

Action by assignee of contractor in building contract against owner to recover whatever was due contractor at time of assignment, where assignee, although he could not recover on contract because of small breaches, was

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allowed to recover what might have been due in action on *quantum meruit*, see ASSIGNMENT, 4, 5.

Agreement, made by vendor with person buying stock in certain company, to repurchase stock at end of one year for $1,000, if vendee so desired, and guaranteeing to pay vendee "dividends amounting to not less than eight per cent per annum" was held not to be broken if, after one year, no dividends were paid, see CONTRACT, 5.

Rescission.

18. In the absence of fraud, nothing less than conduct on the part of one party to a contract that amounts to an abrogation of it, or takes away its foundation, gives the other party to the contract a right to rescind it. *Runkle* v. *Burrage*, 89.

19. In a suit in equity for a rescission of a contract under which the plaintiff paid money to the defendant as an investment in a certain enterprise, and for an accounting as to the money, it appeared that the only agreement or contract made was that the plaintiff, by his subscription to the enterprise, became interested with the defendant and some other persons whose names he did not know in an "underwriting syndicate for the flotation of certain copper properties in Arizona and New Mexico." The defendant acted as treasurer and manager of the syndicate and the plaintiff paid in his money in reliance upon the defendant's ability to manage and conduct a copper mining enterprise. The defendant failed to exercise reasonable care and prudence in the matter and the enterprise was a failure. There was no evidence of dishonesty or of fraud on the part of the defendant. *Held*, that the bill should be dismissed, since there was no ground for rescission of the contract. *Ibid.*

CONVERSION.

1. In an action of tort for the conversion of a promissory note payable to the plaintiff and not indorsed by him, the plaintiff testified that he lent the note to the defendant to enable the defendant to exhibit it in a transaction with the maker of the note in which the plaintiff was concerned, and that the defendant afterwards without authority surrendered the note to the maker. The defendant testified that the plaintiff delivered the note to him in part payment for certain real estate. It appeared that the plaintiff had retained certain real estate and personal property which had been conveyed and transferred to him as collateral security for the note, and that the maker of the note brought a suit in equity against the plaintiff, alleging that the note had been satisfied and praying for a decree ordering the return of the collateral. The defendant in the action for conversion offered to prove that in the suit in equity brought by the maker of the note against the present plaintiff the maker alleged that the defendant in the present case had surrendered the note to the maker after having acquired it from the plaintiff in the present case in part payment for real estate, that a master to whom the case was referred found these allegations to be true, and that his finding was confirmed by the judge who heard the

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case, who made a decree ordering the plaintiff in the present case to convey and transfer the collateral to the maker of the note, and that the plaintiff in the present case obeyed the decree and surrendered the collateral without taking an appeal. The presiding judge in the action for conversion excluded the evidence thus offered on the ground that it was immaterial. It did not appear that the defendant expressly offered in evidence the record of the suit in equity. *Held*, that the court must assume that, if the record of the suit in equity had been admitted, it would have appeared that the plaintiff in the present case in his answer in the suit in equity had alleged that he was still the owner of the note and so was entitled to the collateral, and that this was a material fact, because if he chose to assert his title to the note as still his property, that position was on its face inconsistent with bringing the present action for the conversion of the note; so that the evidence offered should have been admitted. *Hill* v. *Wiley*, 243.

Action by administrator against one alleged to have procured money from decedent through fraud or undue influence, see FRAUD, 4.

CORPORATION.

Corporate Liability distinguished from that of Stockholder.

1. In the absence of a statutory provision on the subject, the mere acquisition of all the capital stock, property and assets of a corporation by an individual or by another corporation does not of itself make the new holder liable to pay the debts of the vendor corporation. *Whiting* v. *Malden & Melrose Railroad*, 298.

Foreign.

2. No action can be maintained to enforce against a resident of this Commonwealth, who is a stockholder in an insolvent corporation organized in another State, a personal liability for the debts of such corporation created by the statutes of such other State, where it does not appear that the statutes of such State, as construed by its courts, have provided any remedy for the enforcement of the statutory liability which can be made available outside that State. *Miller* v. *Aldrich*, 109.

Suit by receiver of foreign corporation against heirs and next of kin of stockholder under R. L. c. 141, §§ 26, 28, which was barred under § 9, because claim was not presented to Probate Court and retention of funds by administrator asked for under §§ 13, 14, see EXECUTOR AND ADMINISTRATOR, 8–10; RECEIVER, 1.

Officers and Agents.

Acts of treasurer of savings bank as to procuring security for loan, which were within his authority and ratified, see SAVINGS BANK, 1.

Acts of president of Boston and Providence Railroad Corporation in making deed by authority of board of directors held under circumstances valid, see BOSTON AND PROVIDENCE RAILROAD CORPORATION, 1.

Writ of mandamus issued against fraternal beneficiary corporation directing

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reinstatement of member improperly suspended because of misleading report of committee of investigation, see FRATERNAL BENEFICIARY CORPORATION, 1-3.

By-laws.

Petition that writ of mandamus be issued against fraternal beneficiary corporation directing reinstatement of member improperly suspended, is not to be denied because petitioner did not first resort to by-law regarding reinstatement of suspended members, see FRATERNAL BENEFICIARY CORPORATION, 3.

Liability of Stockholder for Corporation Debts.

Although one person may have acquired all stock of corporation, he is not personally liable for corporation's debts, see *ante*, 1.

Presumptive Legality of Acts under Special Statute.

There is presumption that acts of street railway company under special charter are lawful, see EVIDENCE, 2.

COVENANT.

Against Incumbrances.

See WATERCOURSE, 1.

CUSTOM.

See NEGLIGENCE, 34, 42, 43.

CY PRES.

See CHARITY, 1.

DAMAGES.

In Action of Contract.

1. In an action for the alleged breach of a contract to buy certain real estate from the plaintiff for the sum of $100,000, if it appears that the defendant refused to buy the property except upon a condition which was not contained in the contract, so that the plaintiff was excused from further performance or offer of performance on his part, but it is admitted that $100,000 was no more than a fair price for the property, *it seems*, that the plaintiff cannot recover more than nominal damages for the failure of the defendant to pay that price for it. *Beach & Clarridge Co.* v. *American Steam Gauge & Valve Manuf. Co.* 177.
2. In an action, by a contractor against a corporation, for a breach of a contract in writing, by which the plaintiff agreed to excavate rock from and remove a certain ledge on the land of the defendant, to crush the rock to certain specified sizes and deliver the crushed rock as therein specified,

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where it appeared that the defendant, under an erroneous construction of the contract, wrongfully undertook to terminate it before the whole of the ledge was removed and prevented further performance on the part of the plaintiff, the plaintiff, upon the question of damages, showed that he had made a sub-contract for a stone crusher with an engine and an engineer to run it, a boiler, cars and other equipment required to crush the stone into the sizes called for by his contract with the defendant, and, subject to the defendant's objection and exception, was allowed to put in evidence the price which he was required by the sub-contract to pay for what was furnished. The judge properly instructed the jury that the plaintiff was entitled to recover as damages, if he prevailed, the difference, if any, between what it would have cost him to complete the work according to the contract and the sum which he was to receive therefor. *Held*, that the case of Smith *v.* Flanders, 129 Mass. 322, seemed to be decisive in favor of the admissibility of the evidence, but that, even if the evidence was admitted wrongly, the defendant could not have been harmed by its admission, as the cost of completing the work would not be enhanced by the existence of the sub-contract and might be diminished by it. *Gaffey* v. *United Shoe Machinery Co.* 48.

Where, under contract for sale of coal containing clause exempting seller in case of strikes, seller informs purchaser of strike and refuses to perform contract, and thereafter within period stated in contract purchaser orders coal, purchaser must pay for coal so ordered at market, and not at contract, price, see CONTRACT, 16.

In Action of Tort.

Damages which bailee of chattel, which was destroyed by negligence of defendant, may recover, see BAILMENT, 1.

Evidence admissible to show extent of damage to one improperly expelled from ship in foreign port, see SHIP, 2.

Action for trespass by defendant in maintaining wall of building upon plaintiff's land, where it was intimated that, since, in previous action for damages for trespass by building of wall, jury under instructions apparently assessed entire damages, prospective as well as past, no further damages should be allowed, see TRESPASS, 1.

For Property taken or injured by Statutory Authority.

Limitation of time for bringing petition.

3. Under the provision of St. 1903, c. 478, limiting the time within which a petition for damages caused by the abolition of a grade crossing must be brought to "one year after the time the property is entered upon and work actually commenced thereon," it does not matter that the work actually begun was so trifling in amount that no charge was made for it as part of the cost of construction, if it was necessary to do it in constructing the street and it was done in good faith, and there is nothing which requires that the work shall be prosecuted continuously from the time when it actually was begun, although the fact that it was not so prose-

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cuted may be considered in determining whether the work actually was begun at one time or another. *Kenrick* v. *Boston & Albany Railroad*, 1.

4. Under the provision of St. 1903, c. 478, limiting the time within which a petition for damages caused by the abolition of a grade crossing must be brought to "one year after the time the property is entered upon and work actually commenced thereon," an entry for the purpose of constructing any part of a way laid out under the decree of the Superior Court confirming the decision of the commissioners is deemed a taking possession of all the lands included in the laying out, and the limitation begins to run against a petitioner, whether the work was begun upon his land or upon some other part of the way thus laid out. *Ibid.*

Temporary obstruction of easement.

5. Upon a petition for the assessment of damages under St. 1903, c. 163, § 8, for injury to the petitioner's dwelling houses on Boylston Street in Newton by the trestle constructed, and used during a certain period, by the Boston and Worcester Street Railway Company over and across the tracks of the Boston and Albany Railroad on that street under the authority given by § 1 of the same chapter, it appeared that the trestle was a structure of timber twenty feet high and was erected in the middle of the street in front of the petitioner's houses, and that the effect of its construction and operation was very similar to that produced by the construction and operation of an elevated railway in a large city, and there were facts which warranted a finding that the trestle, if its construction had not been authorized by the statute, would have been a private nuisance of a grave character to the petitioner's property, and that its maintenance, in the absence of such authority, would have been a use of the street which would have been unreasonable under the general taking. *Held*, that upon such a finding the right to construct and use the trestle could not be included in the easement acquired by the public when the street was laid out, and that under St. 1903, c. 163, there would be a taking of the petitioner's property by right of eminent domain, which would make him a person "legally damaged in his property by the construction, maintenance or use of the said trestle" under § 8 of that statute. *Held*, *also*, that the fact that the damage was not permanent did not affect the petitioner's right to recover compensation for that which he had suffered. *Lentell* v. *Boston & Worcester Street Railway*, 115.

Abolition of lessee's private right of way.

6. The damages suffered by one, who occupies land under a lease in accordance with the provisions of which he had been assigned a right of way which gave him access to a private way connecting with the public streets of a town, which right of way has been extinguished by the construction, in the course of the abolition of a grade crossing of a railroad with the private way, of a new street over it, built to take the place of the former private way, which damages, under R. L. c. 111, § 153, Sts. 1902, c. 440, § 3; 1905, c. 408, § 2, are to be assessed against the railroad company, are the entire damages suffered by the petitioner, not only those suffered

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Damages (*continued*).

within the railroad location. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 585.

7. In assessing damages suffered by a lessee of real estate because of the extinguishment, in the abolishing of a grade crossing of a railroad with a way, of a private way granted to him from the leased premises to a cart path on remaining premises of the lessor leading to public streets by the building across it and between the leased premises and the cart path of a new street upon an embankment which rises from twenty-four to thirty-eight feet above them, the jury should give consideration to the question, whether, by the construction of suitable approaches at the former position of the private way granted to him, the new street could not have been used for all reasonable and necessary purposes of transportation or of travel during the remainder of the term of the lease. *Ibid.*

8. A lessee of real estate, who has erected upon the leased premises a factory with machinery, some of which is fixed and some movable, and who, by the extinguishment, in the course of the abolition of a grade crossing of a railroad with a way, of a private way given him in his lease, is prevented from using his factory or moving the movable machinery, in a petition seeking the assessment of the damages suffered by such work, under R. L. c. 111, §§ 149–152, as amended by Sts. 1902, c. 440; 1905, c. 408, cannot recover for consequent decrease in the value of the movable tools, either directly, or indirectly by proof of its value in connection with the fixed machinery. *Ibid.*

9. Where the owner of a large tract of land leases for a term of ten years a portion of it to a manufacturing corporation, together with a right of way connecting the leased premises with a cart path on the land of the lessor not included in the lease, which leads to public streets, and the lessee thereupon places upon the land leased a building containing fixed machinery, and subsequently, in accordance with proceedings for the abolition of a grade crossing of a railroad with a way, which were begun after the lessee had so built upon the land, a new way, extinguishing the way given to the lessee by the terms of the lease, is constructed upon an embankment which lies between the cart path and the premises leased and rises from twenty-four to thirty-eight feet above them, and both the lessee and the lessor severally petition for an assessment of their damages, the jury should be instructed to assess separately the damages to the leasehold and those to the reversion; and the lessee in its suit can recover the difference between the fair market value of the leasehold, including the improvements, as it was on the date of the decree and such value as it had after the construction of the crossing and the new street, as well as any special and peculiar damages which it sustained by the property's being made inaccessible for the carrying on of business during the progress of the work and by the machinery being injured by dust caused by the construction work. *Ibid.*

10. By the provisions of a lease of land, the lessor granted to the lessee for a term of ten years a portion of a large tract owned by him and a right of way from the leased premises to a cart path on the premises which he retained, which led in both ways to public streets. In the course of the

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abolition of a grade crossing of a railroad with a way, a new street was constructed upon an embankment between and from twenty-four to thirty-eight feet above the premises leased and the cart path, entirely extinguishing the private way given in the lease. This new street was parallel to the cart path, but came to a dead end on the lessor's land. Evidence was admitted on behalf of the respondent at the trial of a petition by the lessee for an assessment of damages suffered by him in the construction of the work of abolition, tending to show that the lessee had made no attempt to secure from the lessor a new right of way through the lessor's land to connect with the new street at a different point than the place where the former right of way existed. Under the lease the lessor could not be compelled to assign such right of way. *Held*, that the evidence wrongly was admitted. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 585.

11. By the provisions of a lease of land, the lessor granted to the lessee for a term of ten years a portion of a large tract owned by him and a right of way from the leased premises to a cart path on the premises which he retained, which led in both ways to public streets. In the course of the abolition of a grade crossing of a railroad with a way, a new street was constructed upon an embankment between and from twenty-four to thirty-eight feet above the premises leased and the cart path, entirely extinguishing the private way given in the lease. This new street was parallel to the cart path, but came to a dead end on the lessor's land. At the trial of a petition by the lessee for an assessment of damages suffered by him in the construction of the work of abolition, the presiding judge charged the jury that they might take into consideration the possibility or probability of the town's continuing a public street to the dead end of the street so left, and thus connecting the new street with the streets to which the cart path ran. *Held*, that the instruction was incorrect since it failed to direct the jury's attention to the fact that, unless the petitioner had some means of access to the new street, the extension of the new street to other streets of the town was of no benefit to him. *Ibid.*

12. In assessing damages suffered by a lessee of real estate by the abolition of a grade crossing of a railroad with a private way, a provision in the lease giving to the lessee a right at any time during its term of ten years to purchase the premises leased at their fair value should not be taken into consideration either to enhance or to diminish the lessee's claim. *Ibid.*

Consolidation for trial of petitions by lessor and by lessee.

On consolidation of two petitions, one by owner and one by lessee of land, for assessment of damages due to abolition of grade crossing, each party is privileged to challenge four jurors peremptorily, see PRACTICE, CIVIL, 1.

Recoupment.

Damages allowed in recoupment in action by assignee of contract, although not suffered until after defendant received notice of assignment, see ASSIGNMENT, 6.

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DEATH.

Action between respective personal representatives of man and of woman for money alleged to have been procured from man by woman through her falsely representing herself to be divorced woman, where question whether woman's first husband was living became material, see FRAUD, 1–3.

Actions for injuries causing death, see AGENCY, 1; NEGLIGENCE, 45.

DECEIT.

False Representation honestly made.

1. An action of tort for deceit cannot be maintained upon a representation of facts made by the defendant in an honest belief that the facts are as represented, although the plaintiff, believing the facts to be as represented, may have acted upon such belief and have suffered damage because the facts were not as the defendant represented them to be. *Mabardy* v. *McHugh*, 148.

In Sale of Land.

2. Where, in the negotiations preceding a sale of real estate, the owner shows to the prospective purchaser upon the face of the earth the true boundaries of the land and does not fraudulently dissuade him from full examination and measurement, and the estate is not so extensive or of such a character as reasonably to be incapable of inspection and estimate, and there is no relation of trust between the parties, and the owner knowingly makes a false representation as to the area of the land, relying on which the prospective purchaser buys the land, the purchaser cannot maintain an action of tort for deceit against the seller. *Mabardy* v. *McHugh*, 148.

DEED.

Covenant against Incumbrances.

Covenant against incumbrances in deed of land through which watercourse runs is not broken because upper riparian owner has right to dam water and use head thus acquired to run mill in proper way and usual manner, see WATERCOURSE, 1.

DEVISE AND LEGACY.

What Estate.

1. A widow, having one son, R., who was her only prospective heir and afterwards became her heir, died leaving a holographic will, of which the residuary clause was as follows: "All the rest, residue and remainder of my property of every description whatever, real, personal and mixed, . . . I bequeath to my said son, R. If the said R. shall not survive me, or if he shall die leaving no will duly executed by him, or if he shall die leaving no lineal descendants, then, in that case it is my wish, and I so direct, that

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it, the property above mentioned, shall at my son's death pass in equal shares to my nieces, daughters of my late sister, E. and to the lawful, living children of either of them who shall then be dead, if any, such last named to take the share which would have gone to their mother had she continued to live." *Held*, that, in the real estate left by the testatrix, her son took a life estate, with a remainder to such persons as he by will might appoint, or, in default of such appointment, to his lineal descendants, or, if there were no lineal descendants living at his death, then to the neices of the testatrix. *Ware* v. *Minot*, 512.

Division among Individuals of Single Class.

2. By the sixteenth clause of his will, a testator devised his homestead to a grand-nephew P. By the seventeenth clause he divided the residue into eighteen parts, of which seventeen parts were given by classes to P.'s brother and sister, to a niece F., and to her children, and to the children of a nephew, but $4,000 was deducted from P.'s share because of the devise of the homestead. The eighteenth clause read as follows: "I give that Said Four Thousand Dollars to the remaining 17 Heirs to be divided Equally among them." One of the children of the niece F. had died before the testator. *Held*, that the division of the $4,000 was to be among those named in the eighteenth clause, excepting P., in a single class, each receiving one sixteenth. *Smith* v. *Haynes*, 531.

Division by Classes.

3. The seventeenth clause of a will, each of the first fifteen clauses of which contained a legacy of a stated amount of money to a specified person, and the sixteenth clause of which devised the testator's homestead to a son of his nephew A., provided as follows: "I give and bequeath the Ballance of my real Estate and Personal Property to my Heirs as follows to the 8 Children of my Nephue A. 8 shares to the 8 children of my Niece F. 8 shares and my said Niece one Share and to" the son of a grandnephew one share "making 18 shares Share and Share alike." One of the eight children of the niece F., who was living when the will was made, died before the testator. *Held*, that it was manifest that the testator intended to dispose of all of his property, and that the clause quoted was intended as a residuary clause, that, although he used the words "share and share alike," he intended the division to be made by classes and not by individuals, and that the eight parts of the residue given to the children of F. should be divided among the seven living at the death of the testator. *Smith* v. *Haynes*, 531.

Bequest of Residue to Executors "for their Services."

4. A testatrix in a will drawn by herself made sixteen bequests to relatives and friends and charitable organizations amounting to $17,500, and also disposed of her personal belongings, silver and household furniture. The will in addition contained the following clause: "Should there be a residue, . . . I request my executors to pay [to two charitable organizations

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named] whatever remains if not more than $1,000. Should there be more than that sum remaining, I direct that the surplus be used toward the payment of my executors for their services under this will." After she had made her will, the testatrix lost considerable money in bad investments, and thereupon went to a lawyer with whom she had a slight acquaintance and executed a codicil in which in the first paragraph she expressly ratified and confirmed her will "in all respects save as the same . . . [was] . . . changed" by the codicil, and in subsequent paragraphs revoked five of her charitable bequests amounting to $2,600, added bequests amounting to $1,050, limited the amount to be given to the charitable organizations by the portion of the will above quoted to $500, stated "it is my desire that regardless of any residuary provisions contained in said will my executors receive in any event fair compensation for their services," revoked the nomination of one of two executors named in her will, who was her nephew, and substituted for him the lawyer who drew the codicil, and stated, "All provisions of said will applicable to executors shall apply to" the newly named executor. After administration of the estate, and the payment of $900 to the executors on account of their services, there was left $3,000 which the executors claimed under the terms of the will. *Held*, that under the terms of the will and codicil such residue went to the executors for their own benefit. *Fernald* v. *Gooch*, 408.

Charity.

Construction of residuary clause of will according to which trust created thereby was ordered to be administered *cy pres*, see CHARITY, 1.

Spendthrift Trust.

Construction of spendthrift trust created by agreement between donor and insurance company and by will of donor, see TRUST, 1.

Interest on Legacy.

Terms of legacy held not to preclude legatee from receiving interest from one year after death of testatrix, see EXECUTOR AND ADMINISTRATOR, 7.

Power of Trustee to sell Real Estate.

Trustee under certain will held by necessary implication to have power to sell real estate, see TRUST, 2, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOG.

1. In an action under R. L. c. 102, § 146, against a man and a woman to recover double damages for being bitten by a dog of which the defendants were alleged to be the owners or keepers, the presiding judge refused to rule that there was no evidence on which the jury could find that the dog

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was kept by the two defendants jointly, and allowed the jury to return a verdict for the plaintiff against both defendants. The man defendant, called by the plaintiff as an adverse witness under R. L. c. 175, § 22, testified that two years before the bringing of the action he sold certain dog kennels, theretofore established on his land and owned by him, together with the good will of the business done there, to the woman defendant, who was in the employ of his wife, that after the sale the dogs continued to be kept on his land, that he accompanied them to various dog shows where they were exhibited, that he had accepted the fee for the service of one of the dogs, and that the woman defendant also took the fee for service when she was about. He also testified that he bought food for the dogs. He explained that, in doing the acts to which he testified, he was acting in behalf of the woman defendant, and that he paid over to her the money he received. There also was evidence that the two defendants had been seen walking together accompanied by a group of dogs, including the dog that bit the plaintiff, and that the man defendant had been seen feeding that dog. It further appeared that the kennels had been carried on under the same name before and ever since the date of the bill of sale to the woman defendant. The woman defendant did not appear in court. Evidence was introduced by the defendants that the woman defendant was licensed to keep various dogs on the premises, and there was evidence from which it could have been inferred that the dog which bit the plaintiff was included in the licenses. *Held*, that the evidence warranted a finding that after the delivery of the bill of sale the dogs were kept by the defendants jointly, and that the ruling of the trial judge was right. *Anderson* v. *Middlebrook*, 506.

DONATIO CAUSA MORTIS.

See GIFT, 1.

EASEMENT.

Right of owner of land through which watercourse runs, to dam waters and use head thus acquired for running mill in proper manner and usual way, is not dependent upon easement acquired by grant or prescription, see WATERCOURSE, 1.

ELECTIONS.

Vote by precincts as to acceptance of provisions of St. 1900, c. 133, held not to have been acceptance of act by town "at an annual town meeting or at any town meeting duly called for the purpose," see NATICK, 1.

ELEVATED RAILWAY.

Maintenance of temporary trestle and cars thereon over highway held not use included in easement of public and therefore ground for claim of damages by adjacent owner, see DAMAGES, 5.

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ELEVATOR.

Actions for injuries in connection with elevator and elevator wells, see NEGLIGENCE, 4, 5, 9, 41–44; PRACTICE, CIVIL, 6.
Action for injuries to boy who ran and jumped upon moving freight elevator and was crushed, see NEGLIGENCE, 41.
Action by employee in shoe factory against employer for injuries resulting from his falling into elevator well alleged to have been improperly guarded, see NEGLIGENCE, 4, 5, 9.

EMBEZZLEMENT.

Indictment for larceny which formerly would have been charged as embezzlement, see PLEADING, CRIMINAL, 5; LARCENY, 1, 2.

EMINENT DOMAIN.

Taking under St. 1846, c. 167, of waters of Long Pond and of water rights appertaining thereto included certain rights of grantees from Natick Indians, see LAKE COCHITUATE, 1.
Maintenance of temporary trestle in street in front of certain land by street railway company held to be taking possession of property of landowner by eminent domain, see DAMAGES, 5.
Entry upon any of parcels of land included in way laid out in abolition of grade crossing for purpose of constructing any part of way is, under provision of St. 1903, c. 478, deemed taking possession of all parcels so included, see DAMAGES, 3, 4.
Petitions for assessment of damages by taking or injuring of land by acts of eminent domain, see DAMAGES, 3–12.

EMPLOYERS' LIABILITY ACT.

Notice under statute, see NEGLIGENCE, 8.
Circumstances held not to show that motorman, when killed, was employee of street railway company within meaning of employers' liability act, see AGENCY, 1.

EQUITY JURISDICTION.

For an Accounting.

Suit in equity by trustee in bankruptcy for accounting by daughter to whom had been made assignment of insurance policy by insolvent in fraud of his creditors, see BANKRUPTCY, 7.
Suit in equity for rescission of alleged agreement under which plaintiff paid money to defendant "for the flotation of certain copper properties," see CONTRACT, 18, 19.

To rescind Contract.

Suit in equity for rescission of alleged agreement under which plaintiff paid in money "for the flotation of certain copper properties," see CONTRACT, 18, 19.

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To enjoin Maintenance of Nuisance.

1. A person whose land is injured by the obstruction of a public way by a fence, which is not in the part of the way against which his land abuts, and who shows no damage differing in kind from that suffered by the general public, cannot maintain a suit in equity to enjoin the maintenance of the fence. *Eaton* v. *Locke*, 324.

To redeem from Equitable Mortgage.

2. In a suit in equity, in which the bill alleged the existence of an equitable mortgage created by a deed of certain real estate from the plaintiff to the defendant executed and delivered thirty-one years before the filing of the bill and an instrument executed on the same day by the defendant agreeing to reconvey the real estate on the payment of all indebtedness for professional services rendered and to be rendered by the defendant for the plaintiff, the judge who heard the case found, upon evidence which warranted his findings, that, three years after the instruments described in the bill were executed and delivered, the defendant, having rendered many services to the plaintiff for which he never had been paid, asked the plaintiff for money on account, but that the plaintiff was unable to give him any, that the defendant stated that his bill was very much in excess of the value of the property, that it then was agreed orally that the plaintiff would surrender all claim or right to a reconveyance, and that from that time on the defendant collected the rents, paid the taxes, made repairs and managed the property as absolutely his own, rendering no account, that the agreement of reconveyance previously executed by the defendant was not redelivered to him for the reason that he did not deem this necessary, that thereafter the defendant never presented any bill to the plaintiff and that the plaintiff never asked for one and made no offer of payment, that some correspondence took place between the plaintiff and the defendant at long intervals, in which no claim was made by the plaintiff to any right or interest in the property, and that no reference was made by the plaintiff to any such right from the time he orally agreed to surrender all right or claim to a reconveyance of the property until twenty-eight years later, when he filed his bill. The judge made a decree that the bill be dismissed, and the plaintiff appealed. *Held*, that the decree should be affirmed; that it was not necessary to inquire whether the original transaction constituted a conveyance in trust or equitable mortgage, or whether it was a simple agreement by the defendant to reconvey the real estate upon being paid within a reasonable time the amount which should be due to him for his services, because it could have been found that the plaintiff, twenty-eight years before the filing of his bill, had surrendered any right or claim to a conveyance, and that what took place at that time operated as a payment of the defendant's bill, *pro tanto* at least, if not in full, and an acceptance of the property by the defendant as such payment, and also because it could have been found that, if the plaintiff ever had any right in or to the property as mortgagor or *cestui que trust*, he had lost it by reason of the adverse possession of the property by the defendant

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under a claim of right and with the knowledge of the plaintiff for a period of more than twenty years. *Porter* v. *Howes*, 54.

To enforce Bond given under R. L. c. 6, § 77.

3. Under the various sections of Pub. Sts. c. 195, and St. 1887, c. 246, one who has furnished labor and materials used in the construction of public works under a contract with the Commonwealth, where the contractor in compliance with the requirement of Pub. Sts. c. 16, § 64, has given a bond to secure the payment by the contractor and by all sub-contractors for all labor performed or furnished and for all materials used in such construction, can obtain an enforcement of the liability of the surety on the bond for the payment of the contractor's debt to him in a suit in equity in which the contractor, the Commonwealth and the surety on the bond are made defendants. *Sampson Co.* v. *Commonwealth*, 326.
4. In a suit in equity to obtain the enforcement of a bond given in compliance with the requirement of Pub. Sts. c. 16, § 64, by a contractor who had a contract with the Commonwealth for the construction of a public aqueduct, to secure the payment "for all labor performed or furnished and for all materials used in such construction," gunpowder used in blasting rock to excavate a trench for the aqueduct and to put the rock in condition for use in the construction of the aqueduct comes within the provision of the statute as a material "used in such construction," in payment for which the plaintiff is entitled to have the liability of the surety on the bond enforced. *Ibid.*
5. In a suit in equity to obtain the enforcement of a bond given in compliance with the requirement of R. L. c. 6, § 77, by a contractor who had a contract with the Commonwealth for the construction of a public sewer, to secure the payment "for labor performed or furnished and for materials used in such construction," piles, furnished and put in position as a part of the completed structure of the sewer and designed for its support, and the labor furnished in putting them in position by means of a pile driver are labor and materials used in the construction of the sewer within the meaning of the statute, for which the plaintiff is entitled to have the liability of the surety on the bond enforced, and the fact that the plaintiff's laborers used the pile driver does not deprive him of his lien for their labor. *Ibid.*
6. Under the provision of R. L. c. 6, § 77, that "officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair," the materials referred to are those that enter directly into the work and become a part of it, or those that are consumed by being applied directly to substances to be moved or changed to make a place for the structure or to be incorporated into it, and the provision does not extend to a claim for coal burned in engines which were used on the work to furnish power for different purposes. *Ibid.*

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7. In a suit in equity to enforce the liability of the surety on a bond given under the requirement of R. L. c. 6, § 77, as security for the payment by a contractor for labor performed or furnished and for materials used in the construction of a public work under a contract with the Commonwealth, it appeared that some of the claimants had accepted notes, payable upon short terms of time, to enable them to raise money for necessary uses, and a master found that these notes were not accepted as payment but were taken for a temporary purpose. There was no evidence of any loss to the surety by these arrangements. The surety contended that it was discharged from its liability for these claims by the giving of time to the debtors. *Held*, that a bond given under the statute is an agreement to make good all deficiencies if the contractor fails to make his payments within a reasonable time, and that under such a contract any reasonable arrangement in regard to payments made by persons not mentioned in the bond should not release the surety unless the arrangement is prejudicial to him; so that the surety here was not discharged from its liability. *Sampson Co.* v. *Commonwealth*, 326.

8. In a suit in equity to enforce the liability of the surety on a bond given under the requirement of R. L. c. 6, § 77, as security for the payment by a contractor for labor performed or furnished and for materials used in the construction of a public work under a contract with the Commonwealth, the claimants are entitled to interest against the contractor, the principal obligor on the bond, from the time when the debts to them severally become due, and the surety is liable to make good any default of the principal obligor in regard to payments, within the amount stated as the penal sum of the bond. The liability as against the surety becomes fixed as to each claim at the time that the statement of the claim is filed under the requirement of the statute. Interest on the amount stated in the bond should be charged from the date of the filing of the bill, and where there has been a default before that date, the surety is liable to pay interest on that amount from the commencement of the suit. *Ibid.*

Construction of such bond in such suit with regard to limitation of time within which claim should be filed, see BOND, 1.

Suit by Trustee in Bankruptcy to recover Property conveyed in Fraud of Creditors.

Where such property was premiums paid on and proceeds of insurance policies, see BANKRUPTCY, 3–7.

To enforce St. 1902, c. 372, regarding placing Wires underground in Worcester.

Action by officers designated in St. 1902, c. 372, regarding placing wires underground in Worcester, cannot be enjoined by suit in equity against city, since city has no power to enforce provisions of statute, see WORCESTER, 2.

Statutory Collection of Debt of Absorbed Street Railway Company.

Suit against West End Street Railway Company under St. 1887, c. 413, § 1, to recover amount of judgment against Malden and Melrose Railroad

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Company rendered before its absorption by West End Street Railway Company, and principles upon which it was determined, see STREET RAILWAY, 1; CORPORATION, 1; EVIDENCE, 1, 2.

EQUITY PLEADING AND PRACTICE.

Parties.

Where amendment substituting different party defendant first was suggested on supplementary brief of plaintiff at argument on report by single justice, which was made with reservation that if ruling by him dismissing bill was correct bill should be dismissed, amendment should not be allowed, but bill should be dismissed, see *post*, 4.

Whether insurance company is necessary party to bill in equity by trustee in bankruptcy to recover amount of premiums paid upon policies which insured, while insolvent, had assigned to his wife, and upon which, while still insolvent, he had continued to pay premiums, see BANKRUPTCY, 6.

Amendment.

Where amendment substituting different party defendant first was suggested on supplementary brief of plaintiff at argument on report by single justice, which was made with reservation that if ruling by him dismissing bill was correct bill should be dismissed, amendment should not be allowed, see *post*, 4.

Master's Report.

1. In a suit in equity a finding of a master may be found to have been warranted by the evidence, although the evidence is very indefinite and depends largely upon circumstances and inferences that do not approach very near to absolute certainty. *Sampson Co.* v. *Commonwealth*, 326.

Objection to Master's Report.

Exceptions to master's report based on objections not filed in accordance with Equity Rule 31 cannot be considered, see *post*, 2.

Exceptions to Master's Report.

2. Where in a suit in equity no special order of the court has been made, exceptions to a master's report which are founded on objections filed with the master more than five days after a notice, given by him to the parties or counsel under Equity Rule 31, that he had finally settled the draft of his report, should be dismissed. *Quimby* v. *Tapley*, 601.

Rules of Court.

If objections to master's report are not filed in accordance with Equity Rule 31, exceptions based on them cannot be considered, see *ante*, 2.

Decree.

3. Where in a suit in equity between partners who had been associated together by oral agreement with no definite time stated for termination of

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the partnership a final decree has been entered, overruling the defendant's exceptions to a report of a master stating the account but failing to decree a dissolution, and the defendant has appealed, it is proper for this court to direct that the decree be so modified as to include an order for a dissolution, and that, so modified, it be affirmed. *Wiggins* v. *Brand*, 141.

Reservation.

4. Where a suit in equity was brought against a city relating to a matter in which certain public officers had exclusive jurisdiction, and the bill was dismissed by a single justice of this court who reported the case for determination by the full court, with the reservation that if the ruling of the single justice was correct, the bill was to be dismissed, otherwise, that such order or decree was to be entered as justice required, the counsel for the plaintiff suggested at the argument before the full court, that if the suit was brought against the wrong party, the terms of the report should be disregarded and the plaintiff should be allowed to amend his bill before a single justice. This suggestion first was made in a supplemental brief of the plaintiff after the defendant's brief had been filed. *Held*, that the terms of the report should be followed, and that the bill should be dismissed. *Postal Telegraph-Cable Co.* v. *Worcester*, 320.

Reservation by Report.

5. Where in a suit in equity the judge who hears the case, after finding certain facts, dismisses the bill, and then reports the case for determination by this court upon the terms that such decree is to be entered "as justice and equity may require," it is the duty of this court to examine the facts and come to their own conclusion, giving due weight to the conclusion of the judge who heard the case. *Nelson* v. *Peterson*, 369.

Appeal.

6. Upon an appeal from a decree made by a judge who heard the case upon oral evidence, which was taken by a commissioner and all of which is before the court, the findings of the judge contained in a memorandum filed by him will not be disturbed unless upon all the evidence they appear to be clearly wrong. *Porter* v. *Howes*, 54.

For application of above principle in suit in equity for redemption from equitable mortgage, see EQUITY JURISDICTION, 2.

Finding of master, based on indefinite evidence and circumstances and influences that did not approach near to absolute certainty, was not disturbed on appeal, see *ante*, 1.

ESTOPPEL.

Recitals in replevin bond held to estop plaintiff from asserting that property was not in possession of either of two joint defendants when it was replevined, see REPLEVIN, 4.

Defendant, in action of contract for value of professional services of plaintiff, is not estopped to contest reasonableness of plaintiff's charge from fact

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Estoppel (*continued*).

that he had admitted in writing performance of services and, although stating that he thought charge too high, had promised repeatedly to pay bill, see CONTRACT, 8, 9.

Affidavit of physician in attendance upon holder of certificate of insurance at time of his death, which was presented to insurer and in which he refused to state that death was result of accident, does not prevent beneficiary from proving afterward by testimony of such physician and of others that death was so caused, see INSURANCE, 6.

EVIDENCE.

Presumptions and Burden of Proof.

1. In the absence of evidence to the contrary, there is always a presumption that the official action of a board of public officers is lawful. *Whiting* v. *Malden & Melrose Railroad*, 298.
2. In the absence of evidence to the contrary, there is a presumption that the action of a street railway corporation in the purchase under the provisions of a special statute of the capital stock, property and assets of another street railway corporation is lawful. *Ibid.*
3. Where, at the trial of an action for personal injuries alleged to have been caused by negligence of the defendant, there is evidence from which the jury would be warranted in finding actual negligence of the defendant in a certain particular, followed by the existence of the very danger which might have been expected to arise therefrom, it cannot be said as matter of law that the plaintiff is bound to go further and to exclude the operation of other possible causes to which conceivably the danger might have been due instead of having been due to the actual negligence which has been shown. *Brooks* v. *Kinsley Iron & Machine Co.* 228.
4. Where, at the trial of an action a material question is whether one of the parties to a marriage was at the time of such marriage still married to another person, and evidence is introduced on both sides, the validity of the second marriage becomes a question of fact to be proved in the light of all the circumstances and of the reasonable inferences from them, and the presumption of innocence of the party alleged to have committed bigamy is not so much stronger than any other evidence or presumption as to compel the assumption of death or divorce in order to infer the existence of such innocence. *Turner* v. *Williams*, 500.
5. In an action of tort for personal injuries alleged to have been caused by the defendant's negligence, the plaintiff must sustain the burden of proving such negligence, but, if he shows circumstances from which negligence of the defendant may be inferred and these circumstances are not explained otherwise, the plaintiff has established a *prima facie* case which entitles him to go to the jury without his excluding every other possible theory as to the cause of the accident. *Gillis* v. *Cambridge Gas Light Co.* 222.

For application of above principle in action by traveller upon highway against corporation which was alleged to have left cover of coal hole in sidewalk insecure, see NEGLIGENCE, 47, 48.

Cases involving principle, *res ipsa loquitur*, see NEGLIGENCE, 37–39, 50, 56, 57.

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One who calls adverse witness under R. L. c. 175, § 22, is not bound by his testimony, see WITNESS, 1.

In action based upon procuring of money by woman by fraudulently representing her husband to be dead or divorced from her, burden of proving falsity of such representations is upon plaintiff, see FRAUD, 2.

Burden of proving justification in action of tort for expulsion of plaintiff from ship is upon defendant; whether same rule applies if action is in contract, was not decided, see SHIP, 4.

Admissions and Confessions.

Fact that defendant, before action of contract was brought by surgeon for professional services, admitted performance of services in letters to plaintiff and, although stating that he thought charge too large, repeatedly stated that he would pay bill, does not preclude defendant from contesting reasonableness of bill nor warrant ordering of verdict for plaintiff, see CONTRACT, 8, 9.

Circumstantial.

Circumstantial evidence which was held sufficient to warrant verdict for plaintiff in action by employee to recover for injuries due to explosion in barrel which formerly had been filled with compound containing naphtha, and into which hot tar was poured, main question being as to what ignited the gas so caused, see NEGLIGENCE, 14.

Opinion: Experts.

Competency of certain expert evidence offered by plaintiff in action of tort for personal injuries to controvert law of physics of which defendant asked court to take judicial notice, see NEGLIGENCE, 25.

Whether hypothetical question to expert witness, based on facts not yet in evidence, but which counsel state will be in evidence, shall be allowed, is in discretion of presiding judge, see PRACTICE, CIVIL, 2.

To impeach Witness.

See WITNESS, 2.

Proof of Foreign Law.

Foreign law alleged in declaration is admitted on demurrer to declaration, and statements in brief at argument of demurrer, stating it to be of different import than as alleged in declaration, cannot be considered by court, see PLEADING, CIVIL, 2, 3.

In Action upon Certificate of Insurance.

What evidence is admissible on certain questions arising at trial of action by beneficiary named in certificate of insurance issued by fraternal beneficiary corporation, see INSURANCE, 6, 7.

Remoteness.

Evidence as to condition of old barrels which formerly had been filled with compound containing naphtha, which was held admissible in discretion

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of presiding judge in action for injuries caused by explosion due to pouring hot tar into such barrel, see NEGLIGENCE, 15.

Evidence of condition of guard of elevator well before plaintiff entered defendant's employ was held to be inadmissible in action for injuries due to improper guard, if it appears that condition at time of accident was same as at time plaintiff entered defendant's employ, see NEGLIGENCE, 9.

Evidence, that in summer bank of earth where contractor was making excavation "slid," is relevant and not too remote to show character of soil at about same place where contractor had removed sidewalk, excavated beneath it, refilled excavation and replaced sidewalk, and sidewalk in following midwinter had caved in as pedestrian was walking on it, see NEGLIGENCE, 51.

Competency.

Question and offer of proof thereon, which were held incompetent to show custom in railroad yard as to watching out for switching engine, see NEGLIGENCE, 84.

Testimony and written statements of respondent which were held to be competent evidence and admissible at hearing of petition for appointment of guardian of respondent as insane person, see INSANE PERSON, 1, 8.

Statements in letters by defendant to plaintiff in action of contract for value of professional services as surgeon, held to be competent on questions of liability and of reasonableness of plaintiff's charge, see CONTRACT, 9.

Privileged Communication.

Letter, sent by person adjudged to be insane to member of bar appointed receiver of his property, is not privileged as communication from client to counsel, see INSANE PERSON, 1.

Relevancy and Materiality.

6. At the trial of an action to recover for the death of the plaintiff's intestate, testimony of a witness tending to show that the decedent generally had been a competent and careful man in the opinion of the witness is not admissible to show that at the time when he was injured he was in the exercise of due care. *French* v. *Sabin*, 240.

Relevance of evidence tending to show waiver by street railway company of certain rules, see STREET RAILWAY, 5.

What evidence is relevant in determining whether proof of death of certificate holder "satisfactory to" board of directors of fraternal beneficiary corporation was submitted to them, see INSURANCE, 2.

Relevance and materiality of evidence, in action for conversion of promissory note, showing position which was taken by plaintiff in a previous suit in which he was defendant and which was inconsistent with his action as plaintiff, see CONVERSION, 1.

Evidence held relevant and material at trial of action by passenger for alleged unlawful expulsion from ship, where defendant sought to justify action by showing that plaintiff was suffering from trachoma, see SHIP, 1-3.

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Evidence as to condition of old barrels which formerly had been filled with compound containing naphtha, which was held relevant and material, and admissible in discretion of presiding judge, in action for injuries caused by explosion due to pouring hot tar into such barrel, see NEGLIGENCE, 15.

In action by baggageman of railroad company to recover for injuries due to negligence of employees of companies jointly maintaining yard in backing switching engine and cars against train between two cars of which plaintiff was working, it is proper to inquire of yard master what steps he took to ascertain whether or not anyone of crew of plaintiff's train was in position of danger when switching train was backed against it, see NEGLIGENCE, 35.

Evidence tending to show that person, who had assisted police officers as interpreter in investigation of charge of murder, had tried to induce certain persons to testify falsely, held, under circumstances, to be inadmissible, see HOMICIDE, 1.

Evidence of condition of guard of elevator well before plaintiff entered defendant's employ held inadmissible in action for injuries due to improper guard, if it appears that condition at time of accident was same as at time plaintiff entered defendant's employ, see NEGLIGENCE, 9.

At trial of petition by lessee of land to recover damages for discontinuance of private way granted him by lessor in lease, evidence that lessee had not asked lessor to assign new way held wrongly admitted, see DAMAGES, 10.

Evidence, that in summer bank of earth where contractor was making excavation "slid," is relevant to show character of soil at about same place where contractor had removed sidewalk, excavated beneath it, refilled excavation and replaced sidewalk, and sidewalk in following midwinter had caved in as pedestrian was walking on it, see NEGLIGENCE, 51.

In action for breach by defendant of contract by which plaintiff was to excavate ledge, crush stone, and deliver it to defendant for use, where it appeared that contract had been performed partly, and that plaintiff had employed sub-contractor to crush stone for him, evidence was held admissible which tended to show how much plaintiff was required to pay sub-contractor for work thus done, see DAMAGES, 2.

Hospital Records.

7. St. 1905, c. 330, relative to the keeping by certain hospitals of records of the cases under their care and the history of the same, and to the admissibility in evidence of such records as to all matters therein contained, before its amendment by St. 1908, c. 269, did not make so admissible records made before its enactment. *Delaney* v. *Framingham Gas, Fuel & Power Co.* 359.

8. The attending physician at a hospital made memoranda of the history and facts as to cases under his care and handed the memoranda to a person in the employ of the hospital whose duty it was to make in a record book a copy of the memoranda, and to have the custody of the record so made. Such recorder had no personal knowledge of the facts so recorded. In a case where such a record was comparatively recent and the attending

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physician was not shown to have been dead, it was *held*, that the record, produced by the recorder and custodian, was not admissible in evidence, under the rule of the common law, to prove the facts therein stated. *Delaney* v. *Framingham Gas, Fuel & Power Co.* 359.

EXCEPTIONS.

In action at law, see PRACTICE, CIVIL, 10.
In trials of probate appeals, see PROBATE COURT, 3.
In criminal cases, see PRACTICE, CRIMINAL, 2; HOMICIDE, 2.
Exceptions to master's report in equity, see EQUITY PLEADING AND PRACTICE, 2.

EXECUTOR AND ADMINISTRATOR.

Accounts.

1. By an agreement under seal among the heirs at law and next of kin of a person who died intestate, made before the appointment of an administrator the parties agreed upon one of their number to be appointed administrator and upon a division of the estate of the deceased. The personal estate amounted to $10,000, and $4,000 thereof was distributed before the administrator was appointed in accordance with the agreement. After the appointment of the administrator an inventory was filed charging him with assets of the value of $10,000, and thereafter in further performance of the agreement he distributed and disbursed the remaining assets of the value of $6,000. *Held*, that the administrator's account should contain in the second schedule, which by R. L. c. 150, § 2, should contain items showing payments, charges, losses and distributions, an item of $4,000, representing assets which never came into his hands, and items amounting to $6,000, representing the disbursements and distributions made by him in accordance with the agreement, and that the account so stated should be allowed. *Fletcher* v. *Fletcher*, 356.

Liability upon Official Bond.

2. Leave to bring suit against an administrator on his official bond may be refused where a single justice who hears the petition on appeal from a decree of the Probate Court finds on evidence warranting the finding that there was no evidence that there had been "any breach of the bond which has brought any damage to the estate, and I do not know that there has been a technical breach. Possibly there has been. . . . There is no such breach of his bond as would justify the Probate Court in ordering an action to be commenced upon it." *Wright* v. *Shaw*, 541.
3. In R. L. c. 149, § 2, providing that the executor of a will, who also is the residuary legatee thereunder, may give a bond as therein provided "with condition to pay all debts and legacies of the testator," the word "debts" includes all enforceable claims, and makes the executor liable on his bond for the benefit of a savings bank, which has obtained a judgment against

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the executor on a claim founded on the fraud of the testator, who, while standing in a fiduciary relation to the bank, induced it to lend money upon security of little value. *Lothrop* v. *Parke*, 104.

Waste.

4. On a writ of *scire facias* against an executor, who also was the residuary legatee of his testator, and under R. L. c. 149 gave a bond conditioned to pay all debts and legacies of the testator, in which the plaintiff makes a suggestion of waste under R. L. c. 172, § 8, and shows that he obtained a judgment against the defendant as executor on which an execution was returned unsatisfied, the defendant may defeat the action by showing that in fact there was no waste, and for that purpose he may show what the assets of the estate were and how they were used. *Lothrop* v. *Parke*, 104.

5. At the trial of a writ of *scire facias* against an executrix, it appeared that the defendant, who was the residuary legatee under the will of the testator, had given a bond to pay all debts and legacies, that the plaintiff had obtained a judgment against her as executrix on which an execution against her had been returned unsatisfied, and brought the writ upon a suggestion of waste, and that the defendant had filed an account by which it was shown that she had paid debts of the testator to an amount considerably larger than the amount of the assets of his estate. The defendant testified that she had no actual knowledge or notice of the plaintiff's claim until after all the assets had been paid to other creditors, nearly two years after the date of her appointment. There was testimony for the plaintiff that the defendant's son, who acted for her in some matters in the settlement of the estate, was shown the plaintiff's papers and was informed of the plaintiff's claim at a time which probably was before the payment of the claims of some of the other creditors. The defendant's son died before the trial. The plaintiff contended that the defendant should at least have declared the estate insolvent, so that the plaintiff might receive his share. The judge, who heard the case without a jury, found as a fact that the defendant had no actual knowledge of the plaintiff's claim and had no notice of it, unless as matter of law the communication to her son constituted such notice. The judge ruled that the defendant might show that in fact there was no waste, and found that she had established the fact by her evidence. *Held*, that the judge was not bound to find as matter of law, either that the defendant's son was so far her general agent as to bind her in a special matter of this kind by his knowledge of the testator's liability to the plaintiff, or that the information given to him was so convincing as to be equivalent to knowledge; that the ruling of the judge that the defendant might show that there was no waste was correct, and that his finding that she had established the fact by her evidence was warranted. *Ibid.*

Distribution.

Allowance of account of administrator who was appointed by agreement of parties, according to which agreement partial distribution was made before appointment, see *ante*, 1.

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Payment of Interest upon Legacy.

6. The fact, that, because of a contest by a legatee, the probate of a will is delayed for over a year, does not affect the right of such legatee to interest on a legacy payable to him at the expiration of a year from the death of the testator. *Claflin* v. *Holmes*, 157.

7. A testatrix, the will of whose husband contained a provision that the principal of a trust fund, of which she had the income during her life, after her death should be paid to such person or persons in such proportions as she should by will appoint, bequeathed the residue of her estate, including specifically the property over which she had such power of appointment, to her "executors and trustees . . . in trust" for certain enumerated purposes, the eleventh of which read as follows: "To pay to D. . . . the sum of $5,000." The executor paid D. the $5,000 three years and eleven months after the death of the testatrix. *Held*, that D. was entitled to interest at the rate of six per cent per annum upon $5,000 from a year after the death of the testatrix. *Ibid.*

Compensation.

Bequest of residue to executors "for their services," see DEVISE AND LEGACY, 4.

Action for Money fraudulently procured from Decedent.

Action by administrator against one alleged to have procured money fraudulently from decedent, see FRAUD, 4; CONTRACT, 11.

Liability of Heirs and Devisees under R. L. c. 141, §§ 26, 28.

8. Where, after an assessment lawfully has been made upon a Massachusetts stockholder in a foreign corporation, he dies and, after an administrator of his estate has been appointed and has qualified by giving bond, the two year period of limitation provided for in R. L. c. 141, § 9, passes, no action for the collection of the assessment can be maintained against the heirs and next of kin of the stockholder under R. L. c. 141, §§ 26–28, which provide for the enforcement of rights of action which accrue after the expiration of the two year period of limitation, since the right accrued not only before the expiration of such period, but also before the death of the decedent. *Converse* v. *Nichols*, 270.

9. The object of the proceedings before the Probate Court under R. L. c. 141, §§ 13, 14, which provide for the retention of funds by an executor or administrator on presentation by a creditor of the estate, before the estate is fully administered, of a claim the right of action to enforce which does not accrue within two years after the giving of the administration bond, is not to collect the claim presented nor even finally to adjudicate its amount or validity, but simply to extend the period of time after which by R. L. c. 141, § 9, it otherwise would be barred. *Ibid.*

10. A citizen of Massachusetts owned stock in a certain corporation organized in a State whose constitution contained a provision that a stock-

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holder in a domestic corporation of that nature should be liable for the debts of the corporation to the amount of the stock owned by him. The statutes of the State provided for the adjudication by a proper court of the inability of such a corporation to pay its debts, for the determination of the amounts of the debts, for successive assessments upon the stockholders and for the appointment of a receiver with power to collect such assessments by proper proceedings in other States. Such proceedings duly were taken in the State of its incorporation with regard to the corporation in question and an assessment was made upon the stockholders. Thereafter the Massachusetts stockholder died, an administrator of his estate was appointed, the two year period of limitation provided for in R. L. c. 141, § 9, passed and the estate was fully administered. Subsequently a second assessment duly was made in the court of the State where the receivership proceedings were pending, and the receiver by a bill in equity sought under R. L. c. 141, §§ 26–28, to enforce payment of such assessment by the heirs and next of kin of the deceased stockholder, contending that the right of action was, as was required by § 27, one which accrued after the expiration of the period of limitation provided by R. L. c. 141, § 9, and which could not legally have been presented to the Probate Court. *Held*, that the bill must be dismissed, since, before the estate of the deceased stockholder had been fully administered, because of the continued pendency of the receivership proceedings, the claim of the plaintiff, although uncertain in amount, had become one which "may become justly due from the estate," and which therefore under R. L. c. 141, § 13, might have been presented to the Probate Court and provision made for the reservation of funds or the giving of security for its payment. *Converse* v. *Nichols*, 270.

FALSE PRETENSES.

Indictment for larceny which properly included counts which formerly would have been charged as obtaining of money by false pretenses, see LARCENY, 1, 2; PLEADING, CRIMINAL, 5.

FEEBLE MINDED PERSON.

1. If the notice in writing, which is required by R. L. c. 87, § 119, to be given, by one applying for the commitment of a feeble minded person to the Massachusetts School for the Feeble-Minded, to the overseers of the town where such feeble minded person resides, is given to one member of that board, it is sufficient. *Roberts Case*, 536.
2. A notice in writing, by one applying to a judge of probate for the commitment of a feeble minded person to the Massachusetts School for the Feeble-Minded in accordance with R. L. c. 87, §§ 118, 119, which is addressed "Overseer of the Poor" of the town where the alleged feeble minded person resides, and which is sent by mail and placed in a post office box where mail for the overseers of the poor of that town is put,

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whence it is taken by one of the overseers, who acknowledges such receipt without the knowledge of his associates, is sufficient notice to satisfy the requirements of § 119. *Roberts Case*, 536.

FENCE.

Maintenance of fence obstructing public way cannot be enjoined in suit in equity by private owner who shows no damage different from that suffered by general public, see EQUITY JURISDICTION, 1.

FIXTURES.

1. Whether an article annexed to a building by the owner of the building continues to be a chattel or becomes part of the realty so as to pass under a deed or a mortgage of it depends upon what was the intention of the owner when he annexed it as manifested by his acts. *Smith* v. *Bay State Savings Bank*, 482.
2. At the trial of an action for the alleged conversion of a set of three bars used in the bar room of a hotel, it appeared that the owner of a parcel of real estate erected thereon a building to be used as a hotel and purchased the set of bars by a conditional sale, the title to them not to become his until the price was fully paid, and placed them in a room which he thereupon fitted up as a bar room. Shortly after the bars were so placed, he executed a mortgage of the realty to the defendant, which contained the usual description of real estate and no mention of the bars specifically. He thereupon used the room as a bar room and about six months later made the payment of the purchase price of them, and four months later still executed a mortgage of personal property to the plaintiff, specifically mentioning and including the bars. There was evidence tending to show that the back bar was in two parts, an upper and a lower, and that neither part was fastened to the realty, that the front bar was fastened by angle irons and wooden cleats screwed to the floor, that the working bar was attached to the front bar, and had various pipes which were fastened to water and drain pipes in the building and were detachable, that the bars were of the regular stock pattern, and could be removed easily through the doors of the building. The defendant foreclosed its mortgage on the realty and, the plaintiff subsequently foreclosing his, refused to give the plaintiff possession of the bars. *Held*, that whether the bars had become a part of the realty and therefore passed under the mortgage to the defendant depended upon what was the intention of the owner as manifested by his acts, which question was for the jury to determine. *Ibid.*

FLATS.

1. The owners of flats in this Commonwealth acquired by virtue of the Colony Ordinance of 1647 hold them subject to the right of the Commonwealth to cover them with deep water by means of a permanent dam

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maintained for purposes of navigation, and their diminution in value from being thus permanently covered with water is not a taking of property from the owners. *Crocker* v. *Champlin*, 437.

FRATERNAL BENEFICIARY CORPORATION.

1. A vote of a mutual benefit corporation suspending one of its members from membership for non-payment of an assessment of $1, regularly made, if passed without notice to the member and without giving him an opportunity to be heard, is irregular and unauthorized. *Horgan* v. *Metropolitan Mutual Aid Association*, 524.
2. At the hearing upon a petition for a writ of mandamus against a mutual benefit corporation to compel the reinstatement of the petitioner as a member of the respondent, it appeared that by a vote of the respondent the petitioner was suspended from membership for non-payment of an assessment of $1, regularly made, but that the vote was passed without notice to the petitioner and without giving him an opportunity to be heard, and that at the time the assessment became due the petitioner was disabled and was receiving benefits, or should have been receiving them. A by-law of the respondent provided as follows: "A member being at the time sick or disabled and receiving benefits, cannot be debarred from receiving a continuation of such benefits because of his inability to pay his assessment. The president being authorized to deduct from the sums paid him for benefits such amounts as will keep him in good standing, which money so deducted is to be paid to the financial secretary and his receipt taken therefor." It also appeared that the petitioner was ill and unfit to work, by reason of general debility from consumption, for a period of about three months ending after his suspension by the vote mentioned above, that a sick committee was appointed by the respondent under a provision of its by-laws to investigate his sickness or disability, and upon their report sick benefits were paid to him for about five weeks at the regular rate provided for such cases, less $1.50 deducted under the provision quoted above for a death assessment, and for his monthly dues. Upon a report of the financial secretary that the committee had been unable to find the petitioner at home, the respondent voted to drop the petitioner from the sick list and to discontinue giving him sick benefits. It appeared that the petitioner was ready to co-operate with the committee in arranging to meet them and to be where they could find him, and it did not appear that there was any change of residence or of post office address on his part that had any connection with the action of the respondent or with the petitioner's rights in the matter. *Held*, that a writ of mandamus should issue ordering the petitioner's reinstatement. *Ibid.*
3. Upon a petition for a writ of mandamus, brought by a member of a mutual benefit corporation against the corporation, which has suspended him, to compel his reinstatement, where the petitioner alleges and shows that his suspension was wrongful, it is no ground for refusing to issue the writ that the petitioner did not first resort to the provision of a by-law of the corporation on the subject of the reinstatement of a suspended mem-

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ber, if this provision applies only to the case of one who admits that he was suspended rightly, and who, to avail himself of it, must assume the regularity of his suspension and must pay a membership fee and one month's dues in advance, and who also, if reinstated under the by-law, cannot receive benefits until the expiration of a month from the time of his reinstatement. *Horgan* v. *Metropolitan Mutual Aid Association*, 524.

No recovery on benefit certificate of one who named his wife beneficiary but who, after death of wife, failed to name new beneficiary and died leaving no heir or next of kin and no one dependent upon him, see INSURANCE, 8.

FRAUD.

1. At the trial of an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely respresenting to him that she was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, it appeared that the first husband of the defendant's intestate left her four years before she married the plaintiff's testator, and a witness testified that fourteen years after such marriage he "knew from information from" the defendant's intestate that her first husband "was at Bridgeport, Connecticut." *Held*, that the question whether such first husband was living at the time of the second marriage was for the jury. *Turner* v. *Williams*, 500.
2. In an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely representing to him that she was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, the burden of proving that the first husband was living and was not divorced from the defendant's intestate at the time of the second marriage rests upon the plaintiff throughout the trial. *Ibid.*
3. At the trial of an action by the administrator with the will annexed of the estate of a man against the administrator of the estate of a woman, for money alleged to have been had and received to the use of the estate of the plaintiff's testator by the defendant's intestate through fraud practised by her upon the plaintiff's testator in inducing him to marry her by falsely representing to him that she was divorced from a previous husband, and, after such marriage, in inducing him to procure life insurance in her favor and to convey real estate to her, the proceeds of which she received after his death, there was evidence tending to show that the first husband was living at the time of the second marriage, that the defend-

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ant's intestate had resided continually in Middlesex County in this Commonwealth after her first husband left her and that the only divorce proceedings in that county in which any one of her name was a party was a libel which she had filed four years before her second marriage for a divorce from her first husband, and that the libel was dismissed a year before the second marriage. There was testimony, introduced without objection, that the plaintiff's testator during his life had said that the defendant's intestate "was a divorced woman and that she had told him she was a divorced woman." *Held*, that the question, whether at the time of the second marriage the defendant's intestate was married to her first husband, was for the jury. *Turner* v. *Williams*, 500.

4. The evidence at a trial tended to show that M., an unmarried woman, had lived with her brother until his death in June, 1902, in a three tenement house which she owned in the north end in Boston, that at that time she was seventy-one years of age and after that time until July, 1904, had lived alone, being bedridden with cancer of the breast after March, 1903, that she did not care for her relatives and that they had nothing to do with her, that in April, 1903, she made a will giving all her property to a certain church; that one H., a woman, constantly urged, "had her tormented to death," to sell her house, that much against her will she sold her house in July, 1904, the transaction being carried through in H.'s absence by H.'s son in law and a person who might have been found to have been acting as H.'s attorney both at that time and in subsequent litigation regarding the matter, that M. felt very badly at leaving the house and was moved to H.'s house by H.'s husband in an unkind manner two weeks after the sale, that at H.'s house M. grew rapidly worse; that on September 7, 1904, H. procured from M. orders for $8,300 which M. had in certain banks and procured the money; that on September 29 H. took persons who were calling upon M. aside and inquired of them what M. was going to do with her money, and on being told the disposition provided for in the will, stated "I do not think that is right. . . . If that is the case, let her get a trained nurse," that on October 8, M., calling for her pocket book in H.'s presence, kept possession of it, that M. died on October 10, 1904, from exhaustion produced by cancer of the breast from which she had been suffering for four years, that repeatedly after she went to H.'s house she had emphatically stated that her property was to "go to the church," but signified that she did not wish to talk of the matter in H.'s presence, that, after the death of M., H. stated that she had given her a present of $1,000. *Held*, that there was evidence from which a jury would have been warranted in finding that H. wrongfully obtained money of M. in her lifetime, for which M.'s administrator had a right of action after M.'s death. *Devlin* v. *Houghton*, 75.

If part of will is procured by undue influence, that part may be rejected and rest allowed, see PROBATE COURT, 1.

In absence of fraud, nothing less than conduct on part of one party to contract which amounts to abrogation of it, or takes away its foundation, gives other party right to rescind it, see CONTRACT, 18, 19.

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Fraud (*continued*).

Misrepresentation of facts, made upon honest belief that they were as represented, is not ground of action for deceit, although person to whom misrepresentation was made, acting upon belief in it, was damaged, see DECEIT, 1.

Proper submission to jury, on appeal from decree of Probate Court allowing will, of two issues, whether whole will was procured by undue influence, and whether part was so procured, and, if so, which part, see PROBATE COURT, 1, 2.

Action against owner of land for deceit in representing to purchaser that land's area was greater than it was, held not maintainable because owner pointed out boundaries to purchaser and did not dissuade him from measuring, see DECEIT, 2.

Action by contractor for value of labor and materials furnished in construction of building, where owner and contractor honestly had thought they were bound by contract, but, through fraud of architect, they were not so bound and where amount already paid by owner equalled amount which building had added to land, but was less than value of labor and materials furnished by plaintiff, see CONTRACT, 12, 13.

FRAUDULENT CONVEYANCE.

Suit by trustee in bankruptcy to set aside fraudulent assignment of life insurance policy, see BANKRUPTCY, 7.

GIFT.

1. In a suit in equity by an administrator to compel the delivery to him of property which had belonged to his intestate and which was claimed by the defendant, as the president and a trustee of a voluntary association of which the intestate was a member, by virtue of an alleged *donatio causa mortis* to the association, it appeared that the property of the intestate consisted of certain wearing apparel and $500 in money. Some of the wearing apparel was in a trunk and some of it was hanging in a closet of his room, which he occupied as a boarder. One morning he was very sick and knew it. Before leaving for the hospital, in which he died, he handed the key of the trunk to his landlady and said, "Here is the key of my trunk. Don't give it to anybody but the president, Mr. P., [the defendant] or the board of trustees. Give it to them." He also told her in substance that there was $500 in a pocket book in his trunk, that there was a dress suit that he intended should be used as his burial clothes, that there was some clean underwear which he wished the landlady to "pick out" for a similar or some other purpose and some shirts which his nephew might wear. The landlady said, "There is lots of clothes in the closet. Who will I give the trunk to and all that?" He said, "The society. They will take charge of everything. Do not give the key to anybody but Mr. P. or the board of trustees." The landlady said, "This ain't legal, Mr. L. You have to have it in black and white." He said, "Well, Mr. P. is to come to-night, and I will send him word to come to the hos-

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pital. . . . If I am not cremated, I want a little headstone put up, a grave and a headstone with perpetual care." The landlady said, "I guess there won't be much left after that." He said, "I don't want an expensive one, I want a neat little stone. What is left I want the society to have." The trial judge expressed the opinion that the evidence did not compel him to hold that the gift was incomplete. He ordered that the bill be dismissed, and reported the case to this court for such decree as equity and justice might require. *Held*, that, as the intestate did not intend to give to the society all of the clothing in the trunk nor all of the money, his delivery of the key of the trunk to the landlady was not intended to change the title to a part of the contents and therefore must fail as to the whole, and that there was no sufficient delivery of the clothes in the closet, what was said about them being rather a direction to hand them to the society than an indication of an intention to part at that time with the title, and, moreover, that it did not appear that the landlady agreed or supposed that she was acting for or on behalf of the defendant or the society in taking the key, but that it appeared rather that she intended to act and supposed she was acting to keep the property safely for the intestate, thinking that his estate could not be disposed of without a writing; consequently, that there was no delivery of any property sufficient to constitute a *donatio causa mortis*, and a decree was ordered for the plaintiff. *Nelson* v. *Peterson*, 369.

GRADE CROSSING.

Petition for damages resulting from abolition of grade crossing of railroad with highway, where petition's private right of way was extinguished, see DAMAGES, 6–12; WAY, 1, 2; PRACTICE, CIVIL, 1.

Action by traveller on highway against city for injuries due to falling off abutment constructed in course of work of abolition of grade crossing of highway with railroad, and alleged to have been caused by negligence of city in not properly warning plaintiff of existence of abutment, see WAY, 4, 6, 7.

Under provision of St. 1903, c. 478, time of entry upon any parcel of property included in way laid out in proceedings for abolition of grade crossing, and beginning in good faith of work thereon, is beginning of one year's period within which petition for damages caused to any parcel in way laid out by such abolition must be filed, although work then done is trifling in amount and not continuous in character, and although such parcel as to which damages are sought was not entered upon until a later date, see DAMAGES, 8, 4.

GREAT POND.

See LAKE COCHITUATE, 1.

GUARANTY.

Guaranty, that certain stock sold by defendant to plaintiff would be resold to plaintiff by defendant at end of year if plaintiff so desired, and that it

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would pay him "dividends amounting to not less than eight per cent per annum," held not to be broken if, after one year, no dividends were paid, see CONTRACT, 5.

HIGHWAY.

See WAY.

HOMICIDE.

1. At the trial of an indictment for murder against a number of defendants, all of whom were foreigners of the same race, the defendants offered to prove that a person, who had assisted the police officers as an interpreter in their efforts to ascertain the facts and to arrest the guilty parties, had tried to induce certain four persons to give false testimony against the defendants and had paid to each of them a substantial sum of money upon his promise to give such false testimony, and also that a police officer, who helped to arrest some of the defendants and assisted in obtaining evidence of the facts communicated to the district attorney, was implicated in the effort to procure false testimony from some of the four persons. The evidence thus offered was excluded. None of the four persons, from whom it was alleged that the false testimony was sought, testified at the trial, and the evidence was not offered in contradiction of or to affect the credibility of any witness. *Held*, that the exclusion was proper; that there was no such legal identity or privity between the interpreter or the police officer and the Commonwealth as to make proof of such dishonest and criminal conduct on their part admissible to disparage the prosecution of the case. *Commonwealth* v. *Min Sing*, 121.

2. At the trial of an indictment for murder against a number of defendants, where one of the witnesses for the government is a police officer who helped to arrest some of the defendants and assisted in obtaining evidence of the facts communicated to the district attorney, if evidence is offered to impeach his testimony, to the effect that he was implicated in an attempt to procure false testimony against the defendants, the evidence thus offered is admissible as affecting his credibility, but, if, in a case where such evidence was offered and excluded, it appears that the witness testified only as to undisputed matters and to nothing that tended to show guilt as to any of the defendants who excepted to the exclusion of the evidence, such an exception will not be sustained, because, if the jury had believed the evidence which the defendants offered and in consequence had given less credence to the statements of the witness, the result of the trial could not have been affected. *Ibid.*

HUSBAND AND WIFE.

Comparison between rights of wife, as beneficiary or assignee of policy on life of insolvent husband, with rights of other beneficiaries. See BANKRUPTCY, 8.

Assignment by deeply insolvent husband to wife of paid up endowment

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life insurance policy, which was held good under St. 1894, c. 522, § 73, that statute being declared not unconstitutional, see BANKRUPTCY, 1, 2.
Although in case of such assignment, premiums thereafter paid while insured was insolvent could be recovered by trustee, see BANKRUPTCY, 4, 5.
Assignment of life insurance policy purporting to be to trustees to be named in will of assignor for sole use of assignor's wife, held to be ineffectual because it did not create present trust and was not executed with formality required for execution of will, see ASSIGNMENT, 2.

INSANE PERSON.

1. A letter sent by a person adjudged to be insane to a member of the bar appointed by the Probate Court receiver of his property is not in the nature of a privileged communication from client to counsel. *Cogan* v. *Cogan*, 58.
2. At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, the proceeding being of a civil and not a criminal nature, the respondent, against his protest, may be called and examined as a witness by the petitioner without the violation of any constitutional right. *Ibid.*
3. At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, evidence of what the respondent testified at the hearing in the Probate Court is admissible, as also are a letter and a folder contained in it, incoherent in character, which were sent by the respondent to the receiver of his property appointed by the court, apparently being one of many similar communications addressed to different persons. *Ibid.*
4. At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an insane person, the respondent conducted his case in person, and he also, against his protest, was called as a witness by the petitioners and testified as such, so that the justice who heard the case had the fullest opportunity to observe his manner and behavior, his physical condition, the way in which his mind appeared to work, the expression of his countenance, and the way he spoke and acted and appeared to feel in regard to matters that came up. There also was the testimony of an expert on insanity that in his opinion the respondent was of unsound mind, and there was evidence of acts and declarations of the respondent which could be found to tend to support that conclusion. *Held*, that the rule, in cases heard as this was, is that the finding of the single justice will not be set aside unless clearly erroneous, and that the court could not say that a finding that the respondent was insane was clearly erroneous. *Ibid.*
Motion, by respondent in petition for guardian of respondent as insane person, that issues be framed for jury, is addressed to discretion of presiding justice, see PROBATE COURT, 6.

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INSURANCE.

Life.

Comparison between rights of wife as beneficiary of or assignee of insurance policy on life of husband, and rights of other beneficiaries, see BANKRUPTCY, 3.

Assignment by deeply insolvent husband to wife of paid up endowment life insurance policy, which was held good under St. 1894, c. 522, § 73, that statute being declared not unconstitutional, see BANKRUPTCY, 1, 2.

Although trustee could recover premiums paid by insured while insolvent, see BANKRUPTCY, 4, 5.

Where assignment of such policy was made to daughter of insolvent insured under such circumstances, trustee was allowed to recover amount she realized on such policy, see BANKRUPTCY, 7.

Assignment of life insurance policy purporting to be to trustees to be named in will of assignor held to be ineffectual because it did not create present trust and was not executed with formality required for execution of will, see ASSIGNMENT, 1–3.

Accident.

Construction of instrument.

1. The meaning of an agreement by a fraternal beneficiary corporation, contained in a certificate issued to a member, that it will pay to the beneficiary appointed under the terms of a certificate a stipulated amount within ninety days from the receipt by its board of directors "of proof satisfactory to said board of the death of" the member "and that his death has been caused wholly and entirely by external, violent, and accidental means," is that the proof thus furnished must be such as ought to be satisfactory to reasonable men acting reasonably. *Traiser* v. *Commercial Travellers' Eastern Accident Association*, 292.

Construction of policy of accident insurance with regard to requirements as to notice of injury, to classification of risks, and to warranties, see *post*, 3–5.

Performance of condition precedent to recovery.

2. Where at the trial of an action upon a certificate of fraternal beneficiary insurance which required, before payment of a death benefit, that the board of directors of the corporation issuing the certificate should have received "proof satisfactory to said board of the death of" the member to whom the certificate was issued "and that his death has been caused wholly and entirely by external, violent, and accidental means," it appeared that after the death of the certificate holder the beneficiary and a physician, who attended the certificate holder after the accident which was alleged to have caused the death, furnished to the defendant's board of directors affidavits that the death was caused wholly and entirely by external, violent and accidental means, that the board requested further affidavits, which the plaintiff furnished, namely, a second affidavit by the attending physician, and one by a physician who had attended the deceased

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before the accident, in one of which the affiant refused to say that the death was caused by the accident, and in the other of which the affiant stated on information and belief that the death was not so caused. The board thereupon rejected the claim. The presiding judge refused to allow the jury to consider the two additional affidavits. *Held*, that the question, whether under the circumstances the defendant's board of directors acted reasonably in rejecting the plaintiff's claim upon the proof submitted to them, was for the jury, and that in determining that question, while the jury should not be allowed to consider other evidence than that which was submitted to the directors, they should have been allowed to consider all the affidavits which the directors considered. *Traiser* v. *Commercial Travellers' Eastern Accident Association*, 292.

3. A policy of accident insurance contained a condition precedent to liability of the insurer that, in case of an accident, notice thereof should be sent to the insurer "as soon as possible." The insured, while in a lonely camp far from home and kindred, was injured by the accidental burning of one of his hands so severely as to require its amputation two days later. On the fourth day after the accident he sent a notice of it in writing to the insurance company which issued the policy. In an action on the policy, it was *held*, that the requirement meant that due diligence should be used to send the notice with reasonable promptness, and that it was sufficiently favorable to the defendant to leave to the jury, under proper instructions, the question whether the notice was sent as soon as was possible. *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169.

Classification of employment of insured.

4. In an action on a policy of accident insurance, it appeared that the plaintiff was injured by the accidental burning of one of his hands so severely as to require amputation two days later. In the schedule of warranties in the policy the occupation of the plaintiff was described as "proprietor," his business as "manufacturer of infusorial earth," and his duties as "office duties and travelling only." The policy provided that "if the insured is injured . . . in any occupation classified by this corporation as more hazardous than that stated in the schedule of warranties, the corporation's liability shall be only for such proportion of the principal sum . . . as the premium paid by him will purchase at the rate fixed by the corporation for such more hazardous occupation." To show that the plaintiff was injured while in an occupation more hazardous than that described in the warranty, the defendant relied on the facts that for two or three weeks before the accident the plaintiff had been at his works near St. John, New Brunswick, living in a cottage or camp erected for the use of himself and his family, and that, while there, he had directed and assisted in making experiments with infusorial earth in which an acid was used. There was testimony from which it might have been found that substantially all the manual labor was done by a workman, and the plaintiff testified that he went to the works for rest and recreation, and that whatever he did while there was to this end. An employee of the defendant, who had testified as an expert in answer to a hypothetical

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question that the acts named in the question would place the plaintiff in a more hazardous classification than that described in the policy, also testified that it was the business or employment from which the insured derived his livelihood which determined classification by the defendant. The presiding judge left to the jury the question whether the plaintiff was injured in an occupation classified by the defendant as more hazardous than that stated in the statement of warranties in the policy, and instructed them that, if during the period in question the plaintiff was actually working about machinery, experimenting, using acids, and thus was engaged in a more hazardous occupation, he was entitled only to such portion of the principal sum insured as the amount paid would buy according to the schedule of the company. *Held*, that the question properly was left to the jury, and that the instruction gave the defendant no ground for complaint. *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169.

Warranties.

5. Where a schedule of warranties, contained in a policy of accident insurance, is made up almost wholly of printed partial assertions or questions, without punctuation at the end, and intended to be filled out, and most of them are filled out by written answers, but in some instances nothing is written in the blank space, although the sentences thus left incomplete may be in the form of assertions instead of questions, they are to be treated as unanswered questions, and neither affirmation nor denial can be inferred from an omission to fill out the blank spaces. *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169.

Effect as evidence of preliminary affidavit as to cause of death.

6. Although, in an affidavit by the physician who was in attendance upon the holder of a certificate issued by a fraternal beneficiary corporation at the time of his death following an accident, the physician has declined to state positively that death was or was not the result of the accident, the plaintiff in an action subsequently brought against the corporation by the beneficiary named in the certificate to recover the amount named therein is not by such affidavit precluded from introducing in evidence testimony of such physician and of other medical experts tending to show that the death of the certificate holder was caused by the accident within the terms of the policy. Anything to the contrary in Campbell *v.* Charter Oak Ins. Co. 10 Allen, 213, referred to as discredited by subsequent decisions. *Traiser* v. *Commercial Travellers' Eastern Accident Association*, 292.

7. At the trial of an action by the beneficiary named in a certificate of fraternal beneficiary insurance against the corporation issuing it, to recover for benefits agreed in the certificate to be paid upon the death of the certificate holder, the jury should not be allowed to consider, upon the issue whether the death of the certificate holder was caused by a certain accident, preliminary affidavits furnished by the plaintiff to the defendant tending to establish that fact, which were furnished according to a requirment in the certificate that preliminary proof of such fact should be so

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furnished within ninety days of the accident, such affidavits being admissible only to show that the plaintiff had satisfied requirements of the certificate as to such preliminary proof. *Traiser* v. *Commercial Travellers' Eastern Accident Association*, 292.

No Beneficiary.

8. Where a member of a fraternal beneficiary corporation in 1899 receives from the corporation a benefit certificate in which his wife is named as beneficiary, and, after his wife has died, he dies without leaving an heir or next of kin or person dependent upon him and without having designated any person as beneficiary under the certificate in place of his wife, if the constitution and by-laws of the corporation contain no provision as to what person shall receive the death benefit under such circumstances nor as to the benefit's reverting to the corporation, the executor of the will of such deceased member cannot recover from the corporation the benefit in an action at law, either on the ground that under the circumstances a trust results in favor of the executor, or otherwise. *Cook* v. *Improved Order Heptasophs*, 85.

Statutory Provisions as to Misrepresentations and Warranties.

9. In the provisions of St. 1907, c. 576, § 21, that "no oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance by the assured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive or unless the matter misrepresented or made a warranty increased the risk of loss," the word "negotiation" means the entire transaction of applying for and finally issuing the completed contract of insurance, and the provision applies to warranties which are inserted in the policy itself. *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169.

Agent's Commission.

Bill in equity by trustee in bankruptcy of insurance agent against insurance company for accounting and commissions on renewal premiums, which was dismissed because commissions were held not to be due because agent had violated terms of contract of employment, see CONTRACT, 14.

INTEREST.

Neither provisions of will giving terms of legacy nor fact that legatee delayed payment by appeal from decree of Probate Court affects his right to interest at six per cent from year after death of testatrix, see EXECUTOR AND ADMINISTRATOR, 6, 7.

What interest should be allowed in suit in equity to enforce liability of surety on bond given under R. L. c. 6, § 77, as security for payment by contractor for labor performed or furnished and for materials used in construction of public work under contract with Commonwealth, see EQUITY JURISDICTION, 8.

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INTERROGATORIES.

See CONTRACT, 11.

INVITED PERSON.

See NEGLIGENCE, 53.

JOINT TORTFEASORS.

Evidence in action under R. L. c. 102, § 146 against two as joint keepers of dog, for double damages resulting from plaintiff's being bitten by dog, which was held to warrant finding that defendants were joint keepers, see DOG, 1.

JUDGMENT.

Decree of divorce which has become absolute cannot be vacated if court had jurisdiction to grant it, see MARRIAGE AND DIVORCE, 1.

Effect, in action for damages caused to plaintiff by defendant's maintaining wall of building upon his land, of previous judgment for trespass as to same wall, and of previous judgment in writ of entry against defendant, in which plaintiff recovered possession of land, see TRESPASS, 1; REAL ACTION, 1, 2.

JURISDICTION.

Of Superior Court, see ATTORNEY AT LAW, 2, 3; MARRIAGE AND DIVORCE, 1.

JURY AND JURORS.

See PRACTICE, CIVIL, 1.

LAKE COCHITUATE.

1. The taking by the city of Boston of "all the waters of" Long Pond [now Lake Cochituate] and "all the water-rights thereunto belonging or in any wise appertaining" under authority of St. 1846, c. 167, with regard to the taking of certain waters by that city for the purposes of a water supply, deprived persons claiming a right to the use of such waters as grantees of the Natick Indians, to whom certain grants were made in 1659 by the General Court, of any such rights as they thus acquired, and brought them within the provision of St. 1846, c. 167, as to compensation. *Sprague* v. *Minon*, 467.

LANDLORD AND TENANT.

Tenancy at Will.

1. Where a lease of real estate contains a stipulation for the payment, for such further time after the expiration of the term of the lease as the lessee shall continue to occupy the premises, of the same rent at the same periods

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as are provided for during the term of the lease, evidence tending to show continued occupation by the lessee after the expiration of his term with the knowledge and consent of the lessor, and the payment and receipt of rent at the same rate and upon the same rent days as were required by the lease, is sufficient to warrant a finding of the existence of an agreement for a tenancy at will. *Benton* v. *Williams*, 189.

Tenancy at Sufferance.

2. Statement by RUGG, J., of the nature and incidents of tenancy at sufferance. *Benton* v. *Williams*, 189.
3. Where a lease of real estate contains a stipulation for the payment, for such further time after the expiration of the term of the lease as the lessee shall continue to occupy the premises, of the same rent at the same periods as are provided for during the term of the lease, a mere retaining of possession by the lessee after the expiration of the term of the lease, without any agreement expressed or fairly inferable from all the circumstances, makes him a tenant at sufferance. *Ibid.*
4. The owner of a certain building did not own the land upon which it stood, but as a tenant at will paid to the owner of the land a ground rent for such land, and let the building as a store to one who paid him an agreed price therefor. The owner of the land by a lease in writing let a larger parcel of land, which included that upon which the building stood, to the occupant of the building, the lease containing no reservation or condition relating to the building. The owner of the building at once knew of such lease, but did not remove the building from the land, and refused to pay to the lessee any rent for the land it occupied. *Held*, that, upon the making of the lease, the owner of the building became as to the land upon which the building stood a tenant at sufferance of the lessee named in the lease and in the absence of any special agreement between the parties was liable under R. L. c. 129, § 3, to such lessee for rent of the land occupied by the building. *Swift* v. *Boyd*, 26.
5. The fact, that, upon the owner of land making a lease of it to another, and a former tenant at will thus becoming a tenant at sufferance of the lessee, such tenant at sufferance asserts that he will pay no rent to the lessee, does not affect his liability to do so under R. L. c. 129, § 3. *Ibid.*

Construction of Lease.

Construction of lease as to private way granted therein, see WAY, 1.

Landlord's Liability to Tenant.

Where in abolition of grade crossing private way from leased land to public way over lessor's land, which had been granted by lessor to lessee, was abolished, lessor was not required to assign new way to lessee, nor is way of necessity for lessee created, see WAY, 2.

Tenant's Liability for Rent.

6. At the trial of an action of contract upon an account annexed for the use and occupation of certain land, it appeared that the land was occupied by

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a building owned by the defendant, who at one time had paid a ground rent to the owner of the land, and that the building was occupied by the plaintiff by permission of the defendant; that, at the beginning of the period stated in the account annexed, the owner of the land had leased it by a lease in writing to the plaintiff. The answer contained an allegation of payment and there was evidence tending to show an agreement between the parties whereby the rent due to the plaintiff from the defendant was applied toward payment of the amount due to the defendant from the plaintiff, and that both parties treated the building as a chattel. The presiding judge charged the jury that the "defendant must show that the plaintiff agreed not to charge her any land rent after the plaintiff had taken the lease, and that the defendant would be liable to pay said land rent unless he was excused from so doing by the plaintiff." *Held*, that the defendant was not harmed by the charge. *Swift* v. *Boyd*, 26.

Liability under R. L. c. 129, § 3, of tenant at sufferance for rent is not affected by his assertion that he will not pay rent, *ante*, 5.

Lessee's Right to Damages where Leasehold was injured by Acts of Eminent Domain.

Separation of land damages, resulting from work of abolition of grade crossing of railroad with highway, to be recovered by lessor from those to be recovered by lessee, see DAMAGES, 9.

See also DAMAGES, 6–12.

LARCENY.

1. Under the provisions contained in R. L. c. 208, § 26, taken in connection with those contained in R. L. c. 218, §§ 38–40, the former crimes of larceny, embezzlement and the obtaining of property by false pretenses now are merged into one crime of larceny as described in those statutes, which may be proved by evidence that would have warranted a conviction upon any one of the three charges that formerly would have been needed, and accordingly upon the trial of an indictment for larceny the Commonwealth cannot be required to elect which of the three former crimes it will prove. *Commonwealth* v. *King*, 379.
2. Whether the crime of embezzlement or fraudulent conversion by a broker described in R. L. c. 208, § 47, is included in the crime of larceny as described in R. L. c. 208, § 26, and R. L. c. 218, §§ 38–40, or whether it is a separate crime, here was not passed upon, because at the trial of the indictment for larceny at which the question was raised, the jury convicted the defendant upon instructions from the presiding judge, under which they could not have returned their verdict without finding facts which showed the defendant to have been guilty of embezzlement independently of R. L. c. 208, § 47, but it was intimated that it might be that the last named section should be treated as simply creating a new statutory kind of embezzlement to be included in larceny. *Ibid.*
3. At the trial of an indictment for larceny the defendant asked for rulings that there was no evidence which would warrant a conviction on the

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ground that he had obtained money by criminal false pretenses and no evidence, except under a certain count, which would warrant a conviction of larceny at common law. The requests were refused and the defendant was convicted. There was evidence on which the jury would have been warranted in finding that the defendant had sustained a very great loss in starting and attempting to maintain a newspaper; that his regular business of selling certain particular securities had come to an end and he was sorely in need of obtaining some ready money; that he thereupon published highly flaring and sensational advertisements, well adapted to attract the attention and gain the confidence of credulous people, advising the purchase of certain stocks, not upon margin, but upon full payment of the price, and offering upon receipt of the necessary money to make such purchases for customers without profit to himself; that he had an expensive establishment to maintain and did not cut it down or curtail his expenses; that he received large sums of money, with directions to buy particular stocks, but failed to buy them, put off his customers with false excuses, and converted the money to his own use, guarding it against attachment by putting it into the form of certificates of deposit. There also was evidence that either he, or his agents by his instructions, had made to some customers false and misleading statements by which they were induced to send or to pay to him money for stocks which it was falsely represented had been bought for them. *Held*, that there certainly was evidence for the jury on the question of false pretenses; and that the jury also might find from the defendant's advertisements, his methods of business and correspondence with his customers, his false statements as to the purchases which he said that he had made, his false excuses for the non-delivery of stocks which he should have purchased but had not purchased, and his conduct as to the overpayments which many of his customers had made in advance, that his whole scheme was a fraud from the beginning, that his possession of the money and other property of his customers had been obtained by mere trickery with the present intent to convert it to his own use, that he had no rightful possession, and that the delivery to him was made without any intent to pass the title but merely to enable him to make the specific use of the money which was directed, so that in appropriating it he was guilty of larceny at common law. *Commonwealth* v. *King*, 379.

Requisites of indictment and bill of particulars in foregoing case, see PLEADING, CRIMINAL, 3–5.

LEGACY.

See DEVISE AND LEGACY.

LIEN.

Vendor's lien held to be lost because of delivery by carrier to place appointed by vendee, see SALE, 1.

Suit in equity to enforce liability of surety on bond given under R. L. c. 6,

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§ 77, as security for payment by contractor for labor performed or furnished and for materials used in construction of public work under contract with Commonwealth, see EQUITY JURISDICTION, 3–8; BOND, 1.

LIMITATIONS, STATUTE OF.

Defense that action is barred by statute of limitations cannot be taken by demurrer, see PLEADING, CIVIL, 1.

Question whether, on demurrer, statement in declaration that defendant "concealed the cause of action" could be treated as allegation that defendant fraudulently did so, see PLEADING, CIVIL, 4.

Requirement of R. L. c. 18, § 86, that action for amount of tax paid under protest must be brought within three months after payment, is not mere statute of limitations, but is condition precedent to right of action, see TAX, 1.

Suit by receiver of foreign corporation against heirs and next of kin of stockholder under R. L. c. 141, §§ 26–28, held to be barred under § 9, because claim was not presented to Probate Court and retention of funds by administrator asked for under §§ 13, 14, see EXECUTOR AND ADMINISTRATOR, 8–10.

Limitation under provision of St. 1903, c. 478, of time within which petition for damages caused by abolition of grade crossing must be brought is for one year after time any property included in laying out is entered upon and work in good faith is begun thereon, although such work is trifling in amount and is not prosecuted continuously thereafter, see DAMAGES, 3, 4.

MALDEN AND MELROSE RAILROAD COMPANY.

Suit against West End Street Railway Company under St. 1887, c. 413, § 1, to recover amount of judgment against Malden and Melrose Railroad Company rendered before its assumption by West End Street Railway Company, and questions arising therein, see STREET RAILWAY, 1; CORPORATION, 1; EVIDENCE, 1, 2.

MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

MANDAMUS.

Writ of mandamus issued against fraternal beneficiary corporation directing reinstatement of member improperly suspended, see FRATERNAL BENEFICIARY CORPORATION, 2, 3.

Writ of mandamus directing reinstatement of one who, although enrolled in classified list of civil service, had been denied proper hearing under civil service law, see CIVIL SERVICE, 2.

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MARRIAGE AND DIVORCE.

Petition to vacate Decree of Divorce.

1. The Superior Court has no power to vacate a decree for divorce after it has become absolute, where the court had jurisdiction to grant the decree, even though the decree was made because of perjured testimony knowingly procured by the libellant, and because of gross fraud practised upon the court. *Zeitlin* v. *Zeitlin*, 205.

Action between respective personal representatives of man and woman for money alleged to have been procured from man by woman through her falsely representing herself to have been divorced from former husband, see FRAUD, 1–3.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY.

MILLS AND MILL PRIVILEGES.

Right of owner of land through which watercourse flows to dam its waters and use head of water thus acquired for running mill in proper way and usual manner is right inseparably connected with ownership of land, and does not depend upon acquisition of any easement by deed or prescription, see WATERCOURSE, 1.

MISTAKE.

Mistake of parties which prevented contract between contractor and owner of land from having effect, where building was built on land before mistake, which was concealed by fraud of architect, became known to either party, see CONTRACT, 12, 13.

MORTGAGE.

Of Real Estate.

1. The assignee of a mortgage of real estate acquires the right to foreclose it for a breach of condition which occurred before the assignment. *Gerrity* v. *Wareham Savings Bank*, 214.
2. A savings bank agreed to make a loan to a landowner, who was engaged in constructing a building on his land and already had made a mortgage on the land to secure a construction loan which was to cover the whole or any part of the amount named in the mortgage which should be advanced by the mortgagee. This mortgage was recorded. The bank was to take a mortgage on the same property if the title was found to be satisfactory. An examination of the title disclosed the fact that there was an attach-

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ment on the land made after and subject to the construction mortgage. The bank thereupon required that the underlying construction mortgage should be assigned to it as part of the transaction of making the loan, and agreed to hold it, first, "for the security and protection" of the bank as the holder of the later mortgage, and, second, for the security and protection of the mortgagee under the construction mortgage, as the holder of a third mortgage which was given to him by the mortgagor on his assigning the construction mortgage to the bank. Thereafter the bank instituted proceedings to foreclose the construction mortgage. The attaching creditor, who had obtained a judgment and had caused the mortgaged property to be sold to himself on execution, brought a bill in equity against the savings bank to enjoin the foreclosure of the construction mortgage, praying to have the assignment to the defendant set aside, or declared to be a discharge and satisfaction of the assigned mortgage, or to be allowed to redeem the real estate from the construction mortgage without being charged with sums advanced under that mortgage after his attachment had been recorded. *Held*, that, it having been the intention of the parties that the construction mortgage should be kept alive and the indebtedness not extinguished or discharged, the defendant held that mortgage by an effective assignment, and that the mortgage covered all the payments made under it and used for the purchase of the land and the construction of the building as well after notice of the plaintiff's attachment as before, the mortgage, as recorded at the time of the attachment, having fixed definitely the amount of the ultimate indebtedness thereunder and the continuance of the work of construction having merely carried out the contract according to its terms. *Gerrity* v. *Wareham Savings Bank*, 214.

Acts of treasurer of savings bank in requiring assignment to bank of first mortgage instead of having it paid off and discharged, as prerequisite of loan by bank to mortgagor, see SAVINGS BANK, 1.

Assignment to savings bank of first mortgage on real estate, where there is claim on land subject to first mortgage, bank having second mortgage, is valid although requirements of R. L. c. 113, § 26, cl. 1, and § 29 were not complied with, see SAVINGS BANK, 2.

Whether certain set of bars in bar room of hotel were personal property and so included under mortgage of personal property, or were real property and so included under mortgage of real property, see FIXTURES, 2.

Action for breach of contract to purchase real estate where it was alleged that plaintiff was prevented from selling because of collusive acts of defendant and others in preventing him from purchasing land at foreclosure sale to perfect his title, see CONTRACT, 17.

Of Personal Property.

Whether certain set of bars in bar room of hotel were personal property and therefore included in mortgage of personal property, or were real property and so included under mortgage of real property, see FIXTURES, 2.

Equitable.

Suit to redeem from equitable mortgage, see EQUITY JURISDICTION, 2.

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MUNICIPAL CORPORATIONS.

Officers and Agents.

Order of board of aldermen of Boston, purporting to give to new telephone company rights in all present and future streets for maintenance of telephone system not yet inaugurated, held to be attempt to grant franchise and therefore void, see *post*, 1, 2.

Under St. 1902, c. 372, § 1, officers designated by city council of Worcester to act regarding removal and placing underground of wires in streets, are officers of Commonwealth and not agents of city, and under § 7, mayor and aldermen, when acting as board of appeal, are not agents of city, but act as *quasi* judicial board of officers, see WORCESTER, 1.

By-laws and Ordinances.

1. An order of the board of aldermen of Boston, purporting to give to a telephone company, which is incorporated under the laws of this Commonwealth but which has not yet any telephone system in actual operation in the city, a right to establish above and below all present and future streets in Boston all such appropriate structures as may be adapted to the installation and maintenance of an electrical or other system for "the transmission of sound, signals and intelligence," discloses the characteristics of a franchise rather than of a permit, and is beyond the power of the board, and therefore void. *Metropolitan Home Telephone Co.* v. *Emerson*, 402.
2. The power given by R. L. c. 25, § 54; c. 26, §§ 2, 6, to the selectmen of towns and the mayors and boards of aldermen of cities to permit the use of public ways for telegraph and telephone wires by the laying of wires in the first instance under such ways, is subject to, and cannot be exercised until satisfaction of, the provisions of R. L. c. 122, § 2, as amended by St. 1906, c. 117, relating to the method of applying for such locations, and to public hearings before the granting of them. *Ibid.*

Town Meeting.

Vote by precincts held not to be acceptance by Natick of provisions of St. 1900, c. 133, "at an annual town meeting or at any town meeting duly called for the purpose," see NATICK, 1.

MURDER.

See HOMICIDE.

NATICK.

1. St. 1900, c. 133, providing for an extension to the police and fire forces of the town of Natick of the provisions of the civil service law upon the acceptance of the act by the town "at an annual town meeting or at any

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Natick (*continued*).

town meeting duly called for the purpose," was not accepted at an election on March 1, 1909, although a majority of the voters then voted in favor of its acceptance, since the vote was by precincts under St. 1907, c. 560, § 331, which duly had been accepted by the town and which provides that voting by precincts may be established for the election of town officers and for voting on the question of granting licenses for the sale of intoxicating liquors, but that other questions shall be in order only at the town meeting. *Sweeney* v. *Selectmen of Natick*, 539.

2. The words "official ballot" in St. 1900, c. 133, § 4, with regard to the acceptance by the town of Natick of the provisions of that chapter, mean "a ballot prepared for any election, caucus or primary by public authority and at public expense." *Ibid.*

NAVIGABLE WATERS.

Effect of St. 1903, c. 465, as amended by St. 1906, c. 402, for improvement of Charles River Basin, upon rights of riparian owners and owners of flats, and constitutionality thereof, see CHARLES RIVER BASIN, 1-4; RIPARIAN OWNER, 1; FLATS, 1.

NEGLIGENCE.

Due Care of Plaintiff.

Employees.

Of employee operating defective riveting machine in boiler factory, see *post*, 17.

Of boy running and jumping on moving freight elevator, see *post*, 41.

Of moulder in foundry pouring hot metal into mould which was damp, but which he did not know was damp, see *post*, 18.

Passengers.

Of woman entering side middle door of car of train on elevated railway, see *post*, 40.

Of passenger upon front platform of surface car of street railway as it went around loop at Dudley Street station of Boston Elevated Railway Company in Boston, see *post*, 26.

Travellers on highway.

1. One who, upon leaving an electric street car at eleven or twelve o'clock at night, passes behind it and, as he first comes around to a position from which he can see along a parallel track in the direction in which the car which he has left was going, sees a car approaching thereon a good distance away, but which approaches so rapidly that, when he has passed over the few feet which separate the two tracks and has stepped on to the track in front of the approaching car, it is only about two car lengths away, and who then proceeds diagonally across the track in front of the car with his back partially turned toward it and without looking again because he does not think there is any danger, is not in the exercise of due care. *Cohen* v. *Boston Elevated Railway*, 66.

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2. If, in order to reach a stairway leading to an elevated railway station by way of a platform which is between parallel tracks on the surface of a street, a traveller on the highway, instead of continuing to cross to the platform on a crosswalk on which he is walking, leaves the crosswalk when he still is ten feet from the nearest street car rail and goes diagonally toward the platform for some distance and then along beside the rail for four or five steps with his back to a car which he has seen about two hundred feet away when he left the crosswalk but which he has not looked at again after leaving the crosswalk, and is struck by the car just as he steps upon the track, he cannot be said to be in the exercise of due care, although at the time when he left the crosswalk he "assumed . . . that he had time to cross the track and get on to the platform before the car came along." *Smith* v. *Boston Elevated Railway*, 489.

Of bicycle rider riding into open trench in highway at night, see *post*, 30.

Of one voluntarily stepping upon apparently safe covered coal hole in sidewalk, see *post*, 47.

Of person crossing street railway track in village in front of rapidly moving car, which he either must have seen approaching or was negligent in not seeing, see *post*, 28.

Of person walking by barrier in middle of street and falling off abutment made in street in course of work of abolition of grade crossing of street with railroad, see WAY, 5, 6.

Person in freight yard.

Of driver of truck unloading heavy chattel in freight yard of railroad, see *post*, 46.

Due Care of Plaintiff's Decedent.

Evidence as to due care of one killed by electricity while working near badly insulated wire held to leave question conjectural, see *post*, 45.

Evidence as to habits of decedent as to carefulness held not admissible in such case, see EVIDENCE, 6.

Assumption of Risk.

By employee, see *post*, 4–7, 11, 17, 18, 23.

Invited Person.

Employee of stevedore is invited by owner to use hatches of ship in course of his employment, and owner therefore is under duty to call to his attention dangers in such use that are not obvious or incident to business, see *post*, 53.

Licensee.

Action for injury to plaintiff from negligent operation of freight elevator by defendant's servant, where defendant's servant, who was using elevator according to practice or custom that any servant of any tenant of building might use elevator exclusively until his use was completed, before he had finished using elevator permitted plaintiff to come upon it so that plaintiff was held to be mere licensee, see *post*, 42, 43.

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Negligence (*continued*).

Independent Contractor.

Apart from contract, fact that stevedore is under independent contract with owner of ship does not prevent owner from being under same duty to employee of stevedore, with respect to apparatus and permanent constructions of ship, as though he were his employer, see *post*, 52.

Application of above principle, see *post*, 55.

Employer's Liability.

Plaintiff not employee.

Circumstances held not to show that motorman, when killed, was employee of street railway company within meaning of employers' liability act, see AGENCY, 1.

Fellow servant.

Joint employees of two railroad companies operating switching yard held not to be fellow servants of baggageman in employ of one of them, see *post*, 32.

Ruling regarding law as to fellow servants rightly refused by trial judge because there was no evidence of facts to warrant it, see PRACTICE, CIVIL, 3.

Statutory notice to employer by employee.

3. Where, intending to give a notice under R. L. c. 106, § 75, an employee of a corporation named the K. company delivers to one who is the corporation's treasurer a letter addressed "To the Treasurer of the K. Company" at the company's place of business, which says "You are hereby notified that, while working for you in your foundry . . . I was seriously injured because of an explosion of hot metal . . . ," such notice is not insufficient by reason of not having been addressed specifically to the corporation. *Brooks* v. *Kinsley Iron & Machine Co.* 228.

Assumption of risk by employee.

4. If, at the time when one enters into the employ of the proprietor of a factory, the opening into an elevator well therein is insufficient to satisfy the requirements of R. L. c. 104, § 43, but such insufficiency is so apparent that the employee either knows or ought to observe it, and, because of such insufficiency he is injured, he cannot recover from his employer, since he must be held to have assumed the risk of the injury which he received. *Simoneau* v. *Rice & Hutchins*, 82.

5. At the trial of an action against the proprietor of a shoe factory, by a young man nineteen years of age, who, while employed therein, fell down a freight elevator well, the declaration in three counts alleging negligence of the defendant in failing to protect and safeguard the elevator well as required by R. L. c. 104, § 43, failure to warn the plaintiff of the state of affairs, and, under R. L. c. 106, § 71, cl. 1, a defect in the ways, works or machinery of the factory, it appeared that the plaintiff in the course of his duties was pulling shoe racks from one room to another when the heel of his shoe came off, that he stepped to the opening of the freight elevator well and to fix his heel raised his foot and placed his right hand for support upon a bar which was across the opening, that the bar was six feet

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long, four inches wide and one inch thick and rested at each end upon an iron cleat or half square, that it could be moved lengthwise through the cleats, that, as the plaintiff's hand was resting on the bar, the bar slipped lengthwise out of its support and he fell into the well; it also appeared that the plaintiff had been employed by the defendant for eight days and had had abundant opportunity to observe the condition of the opening. The presiding judge ordered a verdict for the defendant, and the plaintiff alleged exceptions. *Held*, that the exceptions must be overruled, since the plaintiff must be held to have assumed the risk of the displacement of the bar in the manner described. *Simoneau* v. *Rice & Hutchins*, 82.

6. A boy seventeen years of age employed in a paper mill as a third hand upon a paper machine one hundred and fifty feet long, on which dryer rolls and calender rolls revolve with great rapidity, whose duty it is to go into a narrow space between the two kinds of rolls and take out the broken paper which has fallen to the floor, if he knows that the whole machinery is "helping to pull the paper through" and that "the calender rolls were going when the paper was in there," but does not know that there is a suction caused by the revolution of the calender rolls and a likelihood that a roll of paper may be sucked in by those rolls, does not assume the risk of an injury caused by a roll of paper, which he has gathered up and is carrying in his arms, being sucked in by the calender rolls so quickly that he cannot let go of the paper before his hand is drawn in between the rolls. *Halley* v. *Nashua River Paper Co.* 164.

7. A workman entering the employ of one, who is causing work to be prosecuted by his superintendent and employees in a manner obviously dangerous, nevertheless by accepting employment accepts his employer's premises and the methods used by the superintendent and the other employees as he finds them, and neither the employer nor his representative is under any duty to such workman to make any change in such conditions and methods. *Goudie* v. *Foster*, 226.

Application of foregoing principle to employee in laundry, see *post*, 20.

Assumption of risk of falling of boom of derrick left standing against wall, see *post*, 23.

Question for jury whether, under certain conditions, moulder in foundry assumed risk of dampness of mould into which he was pouring molten metal, see *post*, 18.

Whether employee assumed risk of injury due to defective petcock on riveting machine held under circumstances to be question for jury, see *post*, 17.

No assumption of risk by employee in machine shop of defect in tube expander due to its being improperly annealed, see *post*, 11.

Superintendence.

8. In an action by a carpenter, under the employers' liability act, for personal injuries alleged to have been caused by the negligence of the foreman of the defendant, entrusted with and exercising superintendence, in causing a derrick used in putting a heavy beam in place to be set in an improper position with reference to the beam, by reason of which the end of the beam knocked the plaintiff off a wooden horse on which he was stand-

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ing for the purpose of steadying the beam while it was being put in place, it appeared that the plaintiff was a carpenter of eighteen years' experience, during seven of which he had been in the employ of the defendant, and that for the four or five weeks immediately preceding his injury he had been at work on the same kind of work on which he was engaged when he was hurt. He was admitted to have been a competent and experienced workman. The work was comparatively simple in its nature, the beams were not large, and he knew that they were likely to swing. It was his duty to guide one end of the beams into place. He knew thoroughly the position of the derrick and its relation to the place where the beam was to be put. He had placed the wooden horse on which he was standing between the derrick and the end of the beam by direction of the foreman. He testified, on cross-examination, that it would have been a safer position for him if the horse had been on the other side of the column, on the top of which his end of the beam was to rest, instead of being between that column and the derrick, and that, if the horse had been in such other position, the beam, if it swung, would not have struck him. He also said that "he knew that as the timber swings, things are likely to be hit; and that he stood upon the horse for the purpose of steadying the timber," that "he knew that the timber was to be hoisted and went up there for the purpose of guiding the timber and help steady the column, and that it was while he was attempting to do this that the timber pushed him from the horse." *Held*, that, assuming that the derrick was placed improperly, there was no evidence of negligence or of failure of duty on the part of the superintendent toward the plaintiff; that no warning from the superintendent would have given the plaintiff any information which he did not have already, and that the superintendent had no reason to suppose that, so far as respected a man of the experience and capacity of the plaintiff, there was any occasion to change the position of the derrick or to give him any warning as to his conduct. *Lanoue* v. *Nelson*, 554.

Question for jury whether superintendent in foundry was chargeable with negligence causing mould to be damp and unfit for use, see *post*, 18.

Ways, works or machinery.

9. At the trial of an action by an employee in a factory against his employer, to recover for injuries alleged to have resulted from the plaintiff's falling down an elevator well because of an insufficient or defective guard in front of the well, if it appears that, at the time of the accident, the means of guarding the well were the same as they were when the plaintiff entered the defendant's employ eight days before, evidence as to the condition of the opening into the elevator before the plaintiff entered the defendant's employ properly may be excluded. *Simoneau* v. *Rice & Hutchins*, 82.

Question whether dampness of mould in foundry, under circumstances, was basis of action by injured employee under R. L. c. 106, § 71, cl. 1, see *post*, 18.

Dangerous or defective machinery or appliances.

10. At the trial of an action against the proprietor of a machine shop for personal injuries received by an employee caused by a spark flying from

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the pin of a tube expander into his eye when he struck the pin with his hammer, where there is evidence tending to show that the head of such a pin usually is not hardened, but is left soft, and that, when struck with a hammer used for such work, if properly annealed, it will not splinter but will "upset or roll over," and the defendant admits that the pin of the expander furnished to the plaintiff had been hardened, the question whether the defendant negligently furnished to the plaintiff a defective tube expander should be left to the jury. *Anderson* v. *Marrinan*, 193.

11. A machinist, in entering the employ of the proprietor of a machine shop, does not assume the risk of injury due to a tube expander, which is furnished to him by his employer, being defective because it is too hard and because it therefore causes sparks to fly from it when it is struck with such a hammer as ordinarily is used for the purpose, if it appears that such a defective condition could not be discovered by visual inspection. *Ibid.*

12. In an action by an administrator against the employer of his intestate for causing his death by reason of a defective maul with which a fellow workman of the intestate was driving into the ground a stake that the intestate was holding for him, where the plaintiff's theory of the accident is that the maul struck the stake squarely and then glanced off and hit the intestate in the head, evidence, that the metal band around the head of the maul was flush with the end, or, if it was not, that the wood was in some places frayed and sticking out, does not tend to show that the injury was caused by the negligence of the defendant, as neither of these things would make the maul glance off after it was landed fairly on the head of the stake. *Karlson* v. *Brockton*, 224.

13. Until he sees some indication to the contrary, an employee in a gas factory has a right to assume that a barrel, furnished to him by the superintendent of the factory for the purpose of being filled with hot tar, has received whatever inspection is necessary to see that it can be used by him with safety for that purpose. *Delaney* v. *Framingham Gas, Fuel & Power Co.* 359.

14. At the trial of an action at common law against a gas company by an employee in the defendant's gas works, to recover for personal injuries received from an explosion which occurred as hot tar was being poured into a barrel, there was evidence which tended to show that the barrel was second hand and had been purchased empty by the defendant from a shoe company to whom it had been furnished filled with a cement containing naphtha or gasoline, that some of the solution still was in the barrel when delivered to the defendant, that the defendant did not cause the barrel to be inspected as to its contents, except to ascertain whether there was water in it which would be harmful to the tar, and that the hot tar when poured into the barrel caused evaporization of the naphtha or gasoline which mixed with air made an explosive compound. It appeared that other barrels had been so purchased by the defendant and that no explosion ever had occurred in them. The plaintiff testified that there was no flame which could have ignited the compound other than that of a gas jet fifteen feet

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distant from the barrel and of a retort fire twenty-two feet distant, and, of two experts called by the plaintiff, one testified that the compound could not have been ignited from the gas jet, and the other that it might have been, but that it was highly improbable that it was. *Held*, that the jury were warranted in finding that the flame of the gas jet or of the retort fire ignited an explosive compound formed in the barrel, and that there was a duty on the part of the defendant to make an inspection of the barrel before using it for hot tar, and that the injury to the plaintiff was the direct and proximate result of the failure of the defendant to perform that duty. *Delaney* v. *Framingham Gas, Fuel & Power Co.* 359.

15. It is within the discretion of the judge presiding at the trial of an action against a gas company by an employee to recover for injuries due to an explosion alleged to have been caused by the ignition of an explosive gaseous compound resulting from hot tar being poured into a barrel which previously had contained a mixture of which naphtha or gasoline was an ingredient, to admit testimony as to the liability of naphtha in a barrel so to dry as to leave a small amount of naphtha therein, and as to the condition of old barrels. *Ibid.*

16. In an action at common law by one, who was employed by the defendant to operate a riveting machine, to recover for personal injuries alleged to have been caused by the plug of a petcock on the machine being blown out and striking the plaintiff in the eye, the plaintiff can recover if he shows that he was in the exercise of due care and that the injury was due to the facts that the petcock was not a suitable and proper one for the use to which it was put and that it was defective when it was put on, although it appears that the petcock was procured from the defendant's stock room where there were other petcocks of different shapes and sizes, if it does not appear that there was in the stock room any petcock suitable for the need which the fellow employee sought to satisfy. *Oakey* v. *Robb-Mumford Boiler Co.* 340.

17. At the trial of an action by one, who was employed by the defendant to operate a riveting machine, to recover for personal injuries caused by a plug of a defective or unsuitable petcock on the machine being blown out and striking the plaintiff, it appeared that the plaintiff had worked on hydraulic riveting machines for about thirty years, that the machine at which he was injured was operated by compressed air instead of by water pressure and that it had been installed by the defendant for four weeks only, which constituted the plaintiff's entire experience with such a machine, that the petcock in question was procured from the defendant's stock room and by him was put into the machine, the plaintiff having nothing to do with the installation; and the plaintiff testified that he had never repaired the machine himself, although he had helped to do so, that he "did nothing but run the machine," that he was not a machinist and never had had any experience with machinery except in using it, that the only thing he had done with the petcock was to open it and close it about six times in four weeks, that he knew nothing of how it was made or of its inner construction, that he never had had anything to do with putting on petcocks, that for some time before the accident the machine had been

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giving him trouble, that he had thought something was wrong with the pump and repeatedly had reported its condition, and that the machine "kicked . . . every little while." *Held*, that it could not be ruled as matter of law that the plaintiff knew and appreciated and therefore assumed the risk of working with the defective petcock; and that the question whether he was exercising due care was for the jury. *Oakey* v. *Robb-Mumford Boiler Co.* 340.

18. In an action against the proprietor of a foundry by one employed therein as a moulder, to recover for personal injuries caused by an explosion of molten metal which the plaintiff was pouring into a "pig bed" so called, which the defendant had furnished for the purpose, the declaration contained counts both at common law and under R. L. c. 106, § 71, cl. 1, 2. At the trial there was evidence tending to show that rust or dampness in the pig bed would have caused such an explosion as occurred, that it was not the duty of the plaintiff to inspect the pig beds for the purpose of ascertaining whether rust or dampness was present, but that he was expected to use the pig beds as he found them, that, while the presence of rust or moisture sufficient to cause such an explosion as that by which the plaintiff was injured would not be obvious to a moulder, it could readily be discovered by proper inspection, that for many years it had been the defendant's practice to keep the pig beds free from rust and moisture by precautions that had been abandoned during the few weeks or months before the accident, during which time the care of them had been intrusted to a new and inexperienced employee to whom no instructions were given and who took no precautions, and that during that time an unusual number of small but harmless explosions had occurred. It did not appear decisively that the plaintiff knew of this change in the practice of his employer. There was no direct evidence of the presence of rust or moisture in the pig bed at or before the time of the explosion. The plaintiff, an experienced moulder, testified that, if it struck a hard substance, molten metal would fly into small particles, although that would do no more harm than burn the clothing, and that an explosion was liable to occur at any time if a pig bed was not properly kept. There was no evidence that such an explosion as the one in question could have been produced from any other cause than an accumulation of rust or moisture. *Held*, that the questions, whether the explosion by which the plaintiff was injured was caused by the presence of rust or moisture in the pig bed due to negligence of the defendant or of his superintendent, whether the plaintiff was in the exercise of due care and whether he had assumed the risk of the injury, were for the jury. *Brooks* v. *Kinsley Iron & Machine Co.* 228.

19. In an action by a workman in a sausage factory against his employers for personal injuries incurred when set at work to operate a meat chopping machine of the defendants, where exceptions to a ruling of the presiding judge at a former trial, ordering a verdict for the defendants at the close of the plaintiff's evidence, had been sustained by a decision concurred in by a majority of this court, the evidence for the plaintiff at a new trial did not differ in substance from that presented at the former trial, and, after a disagreement of the jury, a verdict again was ordered for the defendants.

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Exceptions alleged by the plaintiff were sustained by this court upon the authority of the former decision. *Boyd* v. *Taylor*, 213.

Dangerous place in which to work.

20. One who enters the employ of the proprietor of a laundry in a room where he knows that it is customary to throw water from a "starcher" upon the concrete floor, from which it runs off into a drain, and that small particles or lumps of starch occasionally are held in solution in such water and become deposited upon the floor, making it slippery, and that the floor is constantly wet, assumes the risk of an injury from his slipping because of the starch upon the floor. *Goudie* v. *Foster*, 226.

21. Where a stevedore, who by the terms of a contract in writing with the owner of a ship has "the sole and entire charge, direction and control of the work" of loading and unloading the ship and is required to furnish all necessary lights, directs an employee, just before midnight on a dark night with no artificial light to assist in covering the hatches of the ship and, while doing as directed, the employee is injured by the falling in of a hatch upon which he was standing, due to an insufficiency of its flanges and coamings of which he did not know and which without a light he could not have discovered on inspection but which he might have discovered if sufficient light had been furnished, the stevedore is liable to his employee for his injuries thus received. *Crimmins* v. *Booth*, 17.

22. Where a stevedore makes a contract with the owner of a ship to load and unload the ship, and the contract provides that the stevedore is to have "the sole and entire charge, direction and control of the work," the stevedore becomes liable to his employees engaged in the work for injuries resulting from an insufficiency of the flanges and coamings of a hatch which was not obvious nor apparent upon reasonable inspection, and of which he might give warning to his employees. Distinguishing Hyde *v.* Booth, 188 Mass. 290. *Ibid.*

23. If a workman employed in the construction of a building, who for the last four or five years has worked more or less around derricks and has helped to move derricks many times when the "boss" has called him, is ordered by a superintendent of his employer to help in moving the parts of a derrick, when a boom of another derrick fifty-two feet long and ten inches by twelve, which previously has been placed by order of the superintendent leaning against the wall at an angle of forty-five degrees with its foot resting on a plank three inches thick and its other end resting against the wall, without anybody touching the boom or the plank on which it rests, suddenly slips and injures the foot of the plaintiff who is working near it, the plaintiff cannot recover from his employer for his injuries thus caused, there being nothing to show what caused the boom to slip and it being impossible to say that the mere placing of such a heavy stick of timber at an angle of forty-five degrees with one end resting on a plank and the other against the wall is evidence of negligence; and, *it seems*, that a workman of so much experience in moving derricks assumes the risk of such an accident as one of the obvious risks of his employment. *Cavagnaro* v. *Soule*, 62.

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Action against several persons, two of whom were employers of plaintiff, for injuries received by plaintiff in falling down elevator well, in which verdict rightly was ordered for defendant because no joint tort was set out in declaration or shown in evidence, see PRACTICE, CIVIL, 6.

Failure to warn.

Action by employee of stevedore against owner of ship for injuries caused by defective condition of hatch of ship which was not obvious or incident to his employment, and of which plaintiff was not warned, see *ante*, 21, 22.

Action by employee for injuries resulting from his falling into elevator well alleged to have been improperly guarded, see *ante*, 4, 5, 9.

Action by carpenter against employer for injuries due to falling upon him of beam of derrick, of possibility of which he was not warned, see *ante*, 8.

Street Railway.

Toward passenger.

24. A passenger on an electric street car who, while in the exercise of due care he was upon the front platform of the car as it approached a station and was preparing to alight, was thrown from the car by reason of negligence of the motorman in the management of the car, is not precluded from recovering from the company operating the car by reason of the existence of a rule of such company that "All persons entering or leaving this car while it is in motion or by the front platform do so at their own risk," if it appears that the rule was not properly posted in the car, and that the plaintiff did not know of its existence. As to whether there could have been any recovery if the rule had been properly posted, the court expressed no opinion. *Cutts v. Boston Elevated Railway*, 450.

25. At the trial of an action against a street railway company by a passenger upon a car to recover for injuries alleged to be due to the plaintiff's being thrown from the front platform of the car because, as the car on an incline entered a curve, which turned to the right from a straight track and then curved in a loop to the left, the motorman first shut off his power and then suddenly turned it on fully, causing the car to go forward with a sudden jerk, testimony of an expert offered by the plaintiff tending to show that, under the circumstances of the case, the plaintiff would have been thrown off the car, and not backward into the car, as the defendant contended he would have been according to a law of physics of which the defendant asked the court to take judicial notice, is competent. *Ibid.*

26. At the trial of an action by a passenger against a street railway company to recover for injuries alleged to have been caused by the plaintiff's being thrown from the front platform of a closed electric car as, after ascending for two hundred feet a four and a half per cent grade leading to the level of an elevated station, the car turned upon a curve and entered a loop which it had to traverse before it reached the platform used for the discharge of passengers, and continued upon the curve on a ten per cent upward grade, there was evidence tending to show that the plaintiff knew of a sign on the door of the car reading, "All persons are warned not to enter or leave

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Negligence (*continued*).

the car while it is in motion, or by the front platform," that he knew that in going upon the front platform while the car was in motion he took more risk than if he had remained in his seat, that he was in no particular hurry, but wanted to catch a connecting elevated train if it was there, that, ever since the incline and curve and loop had been in use by the defendant, in case of almost every car that went up the incline, half of the passengers went out upon the front platform and half upon the rear platform while the car was in motion, and that the plaintiff knew of that fact at the time of the accident; that he went upon the front platform and was about to take hold of the handle of the dasher of the car, when the motorman shut off his power and then suddenly turned it on fully, causing the car to jerk forward in an unusual manner and causing the plaintiff to lose his hold and, there being no gate to prevent him from doing so, to fall off the car. *Held*, that the questions, whether plaintiff was in the exercise of due care and whether the motorman was negligent, were for the jury. *Cutts* v. *Boston Elevated Railway*, 450.

Legal significance of certain rules of street railway company in such action, see STREET RAILWAY, 3–5.

27. Where a city street, paved with asphalt, has a reserved space in the centre twenty-five feet wide, which was laid out as a part of the street "for the use of street railways and for grass" and is so used, and this reserved space is a few inches above the level of the street at either side and is bounded by a granite curbing seven inches wide, and at the intersections of cross streets there are cross overs paved with stone, for the passage of teams, of the same level as the reserved space, a curved corner stone which is the termination of the curbstone at one of these cross overs, three inches higher than the asphalt surface of the street where it starts from the straight curbing of the reserved space, two and a quarter inches above the asphalt at another point nearer a rail of the tracks of a street railway, and one and three quarter inches higher than the asphalt at the place where the asphalt and the paving of the cross over come together, if it has no imperfection and is constructed and laid in the usual manner, cannot be found to be a defect in the highway, and if a woman passenger in an open electric car, in alighting at night from the running board opposite the fourth seat from the rear of the car, steps on such a corner curbstone and turns her ankle, she cannot recover against the corporation operating the car for her injuries thus caused, because the stopping of the car for her to alight at such a place is no evidence of negligence. *Farrington* v. *Boston Elevated Railway*, 315.

Toward traveller in street.

28. In an action against a street railway corporation for personal injuries, from being run down by an electric car of the defendant, it appeared that the accident took place on a street running through a village on which the defendant maintained a single track. There was evidence tending to show that the car was going very fast, and one witness testified that it was going a mile a minute. It was a pleasant day in June. An approaching car could be seen for a distance of at least three hundred feet.

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The plaintiff was walking at the rate of from three to three and one half miles an hour and was driving a pair of horses which he intended to hitch to a plow. He lived nearby, and testified that he knew that cars were likely to come in either direction and that it was a place where cars came at considerable speed. He testified that just before he attempted to cross the track he looked and listened for an approaching car but saw no car and heard no whistle or other noise to indicate that one was approaching. On cross-examination he admitted that the car must have been in close proximity to him when he looked. When he was struck he was crossing the track diagonally with his back toward the approaching car. The evidence indicated that the horses got over the track safely and were not misbehaving, although they broke away and ran when the plaintiff was struck by the car. *Held*, that as matter of law the plaintiff was not in the exercise of due care and so was not entitled to go to the jury; that he must have stepped upon the track in front of a rapidly approaching car which was in plain sight, and, if he looked and listened, he must have done so carelessly, as, even if the car was running at the rate of a mile a minute, it must have been in sight when the plaintiff started to cross the track. *Willis* v. *Boston & Northern Street Railway*, 463.

Action for personal injuries by person who, after leaving electric car, upon trying to cross parallel track from behind car from which he alighted, is struck by rapidly approaching car late at night, see *ante*, 1.

Street railway company was held to owe no duty to one using automobile upon highway in violation of registration laws, except duty not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1.

Plaintiff who was held not to have been in exercise of due care under circumstances in crossing track of street railway in front of approaching car in order to reach steps to elevated railway station, see *ante*, 2.

Leaving unguarded hole in street.

29. Although it is not the duty of a street railway company, across whose track an open trench has been dug by a contractor constructing a system of sewers under a contract with a town, to guard the sewer trench or to remove and replace barriers across its track to enable its cars to pass, yet if, on a dark night, its servants operating one of its cars, on coming to the trench, find a barrier across the track, and no one there to remove it, and thereupon remove the barrier and fail to put it back, leaving the trench unguarded, and a traveller riding a bicycle upon the track rides into the trench and is injured, in an action against the street railway company for his injuries thus caused, there is evidence of negligence on the part of the defendant. *Dix* v. *Old Colony Street Railway*, 518.

30. In an action against a street railway company for personal injuries from riding a bicycle in the evening upon a track of the defendant on a highway into a trench dug across the track, it being alleged that a servant of the defendant had removed a barrier guarding the trench and negligently had failed to put it back, there was evidence that it was a dark night, that the plaintiff was following at a distance a car of the defendant, and, when

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six hundred feet away, saw it pass over the place where the accident happened, that the trench crossed the track at right angles, was four or five feet wide, and had been dug by contractors who were constructing a sewer system under a contract with a town. There were piles of dirt on both sides of the track and at the nearer and farther side of the trench. The plaintiff testified that he was riding his bicycle on the track because it was better going on the stone pavement between the rails than it was outside where the sewer recently had been constructed and the street was rough. There was no barrier or light across the track when the accident happened. The evidence did not warrant a finding that there was a barrier on the nearer side of the trench before the car passed which the plaintiff saw when six hundred feet away, but there was evidence that there was a barrier with a lantern hung on it within about ten feet from the trench on the side away from the plaintiff before this car had passed, that this barrier was removed by a servant of the defendant and that it was not put back. *Held*, that there was evidence warranting a finding that the accident was caused by the failure to put back the barrier about ten feet from the trench on the farther side; *also*, that there was evidence that the plaintiff was in the exercise of due care. *Dix* v. *Old Colony Street Railway*, 518.

Railroad.

Dangerous condition of station platform.

31. If the foreman of section men, who have been removing old ties from the bed of a railroad near a station, gives some of the ties to a stranger, at his request, with permission to take them away, and in taking them away the stranger places two of the ties on the passenger platform of the station, and negligently leaves them there, where a passenger, alighting from a train after dark, stumbles over them and is injured, in an action by such passenger against the railroad corporation maintaining the track and station for his injuries thus caused, there is no evidence that the stranger who left the ties on the platform was the agent of the defendant in doing so, but it is a question for the jury whether the section foreman or the station master, who knew that a stranger was at work removing the ties, was negligent in not preventing the leaving of the ties on the platform where a passenger alighting from a train would be likely to stumble over them. *Moriarty* v. *Boston & Maine Railroad*, 166.

In yard used jointly by two railroads.

32. Where a railroad company operates a switching yard jointly with another railroad company under a contract by whose terms the yard employees are employees of both companies, and all employees while in the yard are put under the immediate supervision and control of one who is joint agent of both companies, a baggageman, who is in the employ of one of the companies only and who has no knowledge of the contract between the two companies nor any notice or knowledge that he is under the direction or control of any one acting either for the other company or

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for the two companies jointly, is not affected by the provisions of the contract, and the joint employees of the two companies are not his fellow servants in any such sense as to bar recovery on his part for injuries resulting to him from their negligence. *Berry* v. *New York Central & Hudson River Railroad*, 197.

33. At the trial of an action against a railroad company by one who, while in the employ of another railroad company as baggageman, lost his hand by its being caught between two cars which he was attempting to couple in a switching yard jointly operated by the two companies, there was evidence tending to show that the plaintiff, who previously had been in the yard only six times, had been ordered in the early morning while it still was dark by the conductor of the train, on which he was to work, to couple two cars to an engine, that at the time there were other cars to be added to the train, that while he was obeying the order some sleeping cars were backed down by a switching engine with unusual force against the cars which the plaintiff was coupling, that no one was upon the forward part of the sleeping cars as they proceeded and no means were taken to warn the engineer of the switching engine that he should stop or "slow down" because of the cars which the plaintiff was coupling; and there was no evidence that it was the practice to give to the trainmen notice of the approach of cars about to be coupled to a train. *Held*, that the questions whether the plaintiff was in the exercise of due care, whether he assumed the risk of the injury, and whether his injury resulted from negligence of the members of the switching crew, were for the jury. *Ibid.*

34. At a trial of an action against a railroad company by a baggageman in the employ of another railroad company for personal injuries alleged to have been caused by reason of negligence of a switching crew in pushing cars with unusual force against cars which the plaintiff was coupling in a railroad yard operated jointly by the two companies, where it appears that the plaintiff was a comparative stranger in the yard and where the negligence of the switching crew complained of was the backing down of the cars without any means being adopted to tell the engineer of the switching engine of the near approach to the cars where the plaintiff was working, it is proper to exclude a question, asked by the defendant of the joint agent of the yard, "Under the practice there, what was the method whereby the men were protected in the operation of their work, as to whether they looked out for themselves or otherwise," the defendant's counsel stating that he wished to show that, "in the specific way of doing work there," it devolved upon the plaintiff before going between cars for the purpose of coupling them to look and ascertain whether the shifting engine was at work at the other end of the train. *Ibid.*

35. At the trial of an action against one of two railroad companies, which jointly operated a railroad yard, for injuries resulting to the plaintiff from a switching engine and cars being backed against cars which he was engaged in coupling, it is proper to ask the yardmaster of the yard what steps he took to ascertain whether or not any one of the crew of the train where the plaintiff was working was in a position of danger when the

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shifting engine was pushing the cars toward the cars where the plaintiff was working. *Berry* v. *New York Central & Hudson River Railroad*, 197.

Use of defective car of company other than defendant.

86. Where one railroad company has the possession and control of and is using in its own business and for its own purposes as a part of one of its trains a freight car owned by another company, its duty to strangers is not discharged merely by establishing an adequate system of inspection and by providing a sufficient number of competent inspectors, but it is under the same liability as if it were itself the owner of the car. *McNamara* v. *Boston & Maine Railroad*, 491.

87. It is the ordinary experience of mankind that the top roof of a railroad car will not blow off even in a high wind if the car is in good condition and in a proper state of repair and, if the roof of such a car does blow off in a high wind while the car is in the possession and control of and is being used by a railroad company, which is not its owner, for its own purposes and as a part of one of its own trains, and a person not a passenger rightly in the neighborhood is injured thereby, it well may be inferred in the absence of explanation that the accident was due to the negligence of such railroad company. *Ibid.*

88. At the trial of an action under R. L. c. 171, § 2, against a railroad company by the administrator of one who, while in the exercise of due care, was killed by being struck by the roof blown from a freight car in a high wind, it appeared that the car was owned by a railroad company other than the defendant and that at the time of the accident it was in the possession and control of the defendant and was being used by it on its own business and as a part of one of its own trains; and there was evidence tending to show that a fascia board was broken off from the roof and that the roof was in such condition that wind could get between it and a metallic roof immediately beneath it, that such a condition was a generally recognized source of danger, that the roof which blew off had been loose fifteen minutes before the accident and in such a condition as to call for an examination while the car was being shunted about, that an examination of the roof was made by employees of the defendant, who found no defect therein, that the wind at the time was blowing fifty miles an hour, and that a proper examination of the car and its roof would have disclosed the imminent danger, with the existing wind, of just such an occurrence as did take place. *Held*, that there was evidence, not only of want of ordinary care on the part of the employees of the defendant who inspected the car and permitted it to continue unrepaired, but also of gross negligence on their part. *Ibid.*

Use of defendant's freight car by another company.

89. Where a railroad company delivers a freight car of which it is the owner to another railroad company which is to deliver the car to a third company in the course of transporting freight, and, after the car has completed its journey, it again comes into the possession of the second company, which without authority from the owner uses it in its own business and as a part

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of one of its own trains, the company which owns the car is not liable, either solely or jointly with the company in whose possession the car is, to a stranger who is injured by reason of a defect or want of repair therein, whether such defect or want of repair is hidden or obvious. *McNamara* v. *Boston & Maine Railroad*, 491.

Damage to freight.

Action against railroad company for damage to heavy chattel while it was being unloaded in freight yard of defendant by plaintiff, bailee of chattel, see *post*, 46.

Elevated Railway.

40. A woman, who at a station of an elevated railway attempts to enter the side middle door of a car, being familiar with the working of such car doors and knowing that the door is likely, upon a given signal, to be closed by a man standing where he cannot see her to warn her after it has begun to close, and in thus attempting to enter pays no attention to ascertain whether the signal has been given or the door has begun to close before she steps on the car, is not in the exercise of due care, and, if her leg is struck by the door of the car, which had begun to close before she began to enter, she cannot recover from the corporation maintaining the car for her injuries thus caused. *Benison* v. *Boston Elevated Railway*, 377.

Action for personal injuries received by passenger who alleged that he was thrown from surface car as it went around loop of elevated structure at Dudley Street station in Boston, see *ante*, 24–26.

Automobile.

See AUTOMOBILE, 1.

In Use of Highway.

Action by person who fell into coal hole against company which left hole insufficiently covered after delivering coal, see *post*, 47, 48.

Action by traveller on highway for injuries due to walking off abutment made in highway in course of work of abolition of grade crossing of railroad with highway, see WAY, 4–7.

Action by one injured by riding on bicycle into open trench which street railway company had undertaken to guard, see *ante*, 29, 30.

Action by person injured when crossing street railway track in front of rapidly moving car which he either must have seen or was negligent in not seeing, see *ante*, 28.

Plaintiff was held not to have been in exercise of due care under circumstances in crossing track of street railway in order to reach steps to elevated railway station, see *ante*, 2.

Action against contractor for injuries received by traveller on street from driving upon pile of dirt negligently dumped there, involving questions whether workman in dumping dirt was acting as servant for defendant and within scope of employment, see AGENCY, 2, 3.

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One using automobile upon highway in violation of registration laws was held to be trespasser, to whom street railway company owed no duty except not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1, 2.

In Use of Elevator.

41. If a boy, a little less than fifteen years of age, when in the basement of a building where he is employed, sees a freight elevator about two or two and one half feet above the basement floor, and, after the elevator has started, comes toward it with a pail in his hand, calls out "Wait a minute," shoves the pail upon the elevator and then attempts to jump on, but, there not being room enough for him to jump on, he lands on his stomach and is crushed between the elevator and the floor above, he is negligent as matter of law. *Johnson* v. *Chandler*, 510.

42. In a business building, in which there is a freight elevator for the common use of all the tenants and their employees, a practice or custom existing in the building, which gives the servant of any tenant who is using the elevator in his master's business the right to use it exclusively until his use of it is completed, is not unlawful or improper, and may be taken into account in passing upon a question of negligence in the use of the elevator by a servant of one of the tenants. *McManus* v. *Thing*, 11.

43. In a business building, in which there is a freight elevator for the common use of all the tenants and their employees, a practice or custom existing in the building, which gives the servant of any tenant who is using the elevator in his master's business the right to use it exclusively until his use of it is completed, if a servant of one of the tenants is thus using the elevator and before the completion of such use complies with the request of the servant of another tenant to allow him to come upon the elevator with a heavy crate for transportation to one of the upper floors, the last comer is a mere licensee, and the master of the man who permitted him to enter the elevator before completing his own use of it owes him no duty except not to injure him by a wilful or wanton and reckless act, even if the servant of such master was acting within the scope of his employment when he turned aside from his own work to accommodate and assist the servant of the other tenant. *Ibid.*

44. In an action for personal injuries alleged to have been caused by the negligent starting of a freight elevator in a business building by a servant of the defendant, a tenant in the building, it appeared that the elevator was maintained for the common use of all the tenants and their employees and that there was a practice or custom existing in the building, which gave the servant of any tenant who was using the elevator in his master's business the right to use it exclusively until his use of it was completed. The plaintiff was a servant of another of the tenants who came upon the elevator with a heavy crate, and the evidence was conflicting as to whether the servant of the defendant, who had been using the elevator to take down some cases of rubbers for shipment, was continuing its use in taking back three cases of rubbers because they were badly broken, and was in

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possession of the elevator when the plaintiff asked permission to bring the crate upon it, or whether, as the plaintiff testified, he found the elevator empty and had loaded the crate upon it when the defendant's servant came upon the elevator and started it, and the plaintiff's foot was caught. The plaintiff asked the presiding judge to rule that if the defendant's servant "kept the elevator at the street level for more than a reasonable time after unloading his goods, the plaintiff had a right to take the elevator to carry his goods to an upper floor." The judge refused to make this ruling on the ground that there was no evidence to show that the defendant's servant kept the elevator an unreasonable time after unloading. There was, in fact, evidence for the defendant which, if believed, would have warranted a finding that the defendant's servant had possession of the elevator and had detained it for an unreasonable time. *Held*, that, although, if the reason given for the refusal of the ruling were the only ground on which it could be upheld, such refusal could not be sustained, yet the ruling was refused rightly on other grounds, namely, that the keeping of the elevator at the street floor by the defendant's servant was not and could not be found to be the proximate cause of the accident, which was the alleged negligent starting of the elevator by the defendant's servant, the fact that the defendant's servant had kept the elevator at the street level for an unreasonable length of time after unloading it, if he did so, being one of the conditions under which the accident occurred but not a cause of it, and that such detention of the elevator did not give the plaintiff a right to take possession of it before the use of it by the defendant's servant was completed. *McManus* v. *Thing*, 11.

Action by employee in shoe factory against employer for injuries resulting from his falling into elevator well alleged to have been improperly guarded, see *ante*, 4, 5, 9.

In not guarding Elevator Well.

Action against several persons for injuries to plaintiff from falling down elevator well, in which verdict rightly was ordered for defendants since no joint tort was set out in declaration or shown by evidence, see PRACTICE, CIVIL, 6.

In Use of Electricity.

45. At the trial of an action against one operating an electric light system, to recover for the death of the manager of a telephone exchange who was alleged, while in the discharge of his duties he was upon a pole upon which were telephone wires and wires of the defendant, to have received a shock from electricity communicated to him from uninsulated portions of the defendant's wires, it appeared that the general conditions of danger upon the pole were manifest and that the decedent either knew or in the exercise of reasonable prudence should have known of them; and there was evidence tending to show that the decedent had completed his work and was ready to descend, and that later he gave an outcry of distress and was seen falling from the pole; but there was no evidence to show what act of his brought him into contact with the defendant's wires. The

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presiding judge ordered a verdict for the defendant. *Held*, that the verdict was ordered rightly, since the question, whether or not at the time when he was injured the plaintiff's intestate was in the exercise of due care, was left on the evidence entirely a matter of conjecture. *French* v. *Sabin*, 240.

In Use of Derrick.

Action by carpenter against employer for injuries due to falling upon him of boom of derrick, see *ante*, 8.

In Use of Hot Tar.

Action by employee in gas factory for injuries due to explosion alleged to have been caused by ignition of gas created by pouring of hot tar into barrel which formerly had been filled with compound containing naphtha, see *ante*, 13–15.

In handling Freight.

46. In an action against a railroad corporation by the proprietor of a truck, in which a heavy chattel was brought to the freight yard of the defendant to be delivered to servants of the defendant for transportation, for injury to the chattel through the negligence of the defendant's servants when lifting it from the plaintiff's truck by means of a derrick, if there is evidence that the driver of the truck, who was the servant of the plaintiff, assisted in making the hitch of the chain that fastened the chattel to the derrick, the defendant is entitled to have the jury instructed that the plaintiff cannot recover from the defendant if he or his agents or servants contributed to the injury. *Bowen* v. *New York Central & Hudson River Railroad*, 263.

In Construction of Building.

Action by employee against employer for injuries due to falling of boom of derrick left standing against wall, see *ante*, 23.

Meat chopping Machine.

Action by employee in sausage factory for injuries received while operating meat chopping machine, see *ante*, 19.

Defective Maul.

Action by workman injured by being struck by alleged defective maul which glanced from stake which fellow workman struck with it, see *ante*, 12.

In leaving Obstruction in Street.

Action against contractor for injuries received by traveller on street from driving upon pile of dirt negligently dumped there, involving questions whether workman who dumped dirt was servant of defendant and was acting within scope of his employment, see AGENCY, 2, 3.

In Railroad Yard.

See *ante*, 32–35.

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In a Foundry.

Action by moulder in foundry for injuries resulting from explosion caused by pouring moulten metal into damp mould, see *ante*, 18.

In a Factory.

Action by employee in boiler factory for injury caused by defective petcock in riveting machine, see *ante*, 16, 17.

Action by employee in sausage factory for injuries received while operating meat chopping machine, see *ante*, 19.

Action by employee in gas factory for injuries due to explosion alleged to have been caused by ignition of gas created by pouring of hot tar into barrel which formerly had been filled with compound containing naphtha, see *ante*, 13–15.

In a Laundry.

Action by employee in laundry for injuries received through slipping upon wet starch upon floor, see *ante*, 20.

In a Machine Shop.

Action by employee in machine shop for injury caused by spark flying from tube expander into his eye, see *ante*, 10, 11.

In a Mill.

Action by boy seventeen years of age for injury received while employed in paper mill, see *ante*, 6.

Coal Hole.

47. It is not negligence as matter of law to step voluntarily on the cover of a coal hole in the sidewalk of a city street, which appears to be safe, with knowledge of the existence of the hole beneath the cover. *Gillis* v. *Cambridge Gas Light Co.* 222.

48. In an action by a woman, for personal injuries caused by one of her legs going down into a coal hole in the sidewalk of a city street when she stepped on the cover which appeared to be safe, against a corporation whose teamster on the morning of the accident had used the coal hole in making a delivery of coke to a customer, there was evidence that, if the rim into which the cover fitted was left clean, the cover, when replaced, would not tilt but would remain firmly in position, but that, if coke was allowed to remain on the rim when the cover was replaced, the cover when stepped on might be thrown up or partially come out. It appeared that the accident occurred more than four hours after the use of the coal hole by the defendant's servant, and the defendant contended that, with the opportunity thus afforded for others to have disturbed or displaced the cover, the evidence failed to show that its negligence was the efficient cause of the injury. *Held*, that, in the absence of any satisfactory explanation by the defendant to the contrary, the jury would have a right to infer that from the time the cover was replaced by the defendant's servant until the

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plaintiff stepped on it the cover had remained undisturbed, and also might infer that the cover slipped or gave way because the defendant's teamster had failed to remove particles of coke which had lodged on the rim, and accordingly that there was *prima facie* evidence of negligence on which the plaintiff was entitled to go to the jury. *Gillis* v. *Cambridge Gas Light Co.* 222.

Of one owning or controlling Real Estate.

49. An apartment house in a city stood fifteen feet back from the sidewalk of the public highway, and the owner built a sidewalk nine feet wide running from the entrance of the house, the outer lines of which curved where it joined the sidewalk of the street, so that the entrance walk there was seventeen feet wide. Abutting on the sidewalk of the street, but upon his own land, the owner of the house maintained a row of bricks set in serrated form and slightly elevated above the surface of the sidewalk. Back of the curved line of the entrance walk where it joined the sidewalk, he maintained a clump of shrubs, and, six inches from the end of the bushes nearest the sidewalk, and about three inches back from the line of the sidewalk, a piece of upright pipe with a wooden plug in it, the whole being about sixteen inches high, and being one of a series of stakes along the top of which a smooth wire was strung. A woman passing on a wet night from the house to the street raised the skirt of her gown from fifteen to twenty inches and, as she turned to the sidewalk, caught it on the top of the stake and was thrown down. *Held*, that the structures maintained by the owner did not constitute a nuisance, and also that the owner in maintaining them was not guilty of negligence toward a person using the entrance of the building by his implied invitation. *Mead* v. *Strauss*, 899.

Action against several persons, one of whom owned certain building in which plaintiff received injuries from falling down elevator well, in which verdict rightly was ordered for defendants because no joint tort was set out in declaration or shown in evidence, see PRACTICE, CIVIL, 6.

Of Contractor constructing Subway under Highway.

50. At the trial of an action against a contractor who, under a contract with the Boston transit commissioners by the terms of which he was responsible "for any injury which" might "result from his act or neglect," was constructing a tunnel for the city of Boston under various public streets, to recover for an injury received by the plaintiff in midwinter because a sidewalk upon which he was walking caved in, the caving being alleged to be due to the fact that the defendant negligently performed his work under the sidewalk, there was evidence tending to show that in the construction of the tunnel, which passed beneath the place where the sidewalk caved in, the sidewalk had been taken up by the defendant and an excavation had been made, which was refilled and the sidewalk replaced two or three weeks before the accident, and that in the summer preceding the accident there had been a "slump" of the soil at about the same place. *Held*, that the doctrine of *res ipsa loquitur* was applicable, and that there was evidence warranting the jury in finding that the accident was caused

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by the negligent manner in which the defendant had refilled the excavation and relaid the sidewalk. *Rockwell* v. *McGovern*, 6.

51. At the trial of an action by one, who was injured in midwinter by the caving in of a sidewalk on a public street, against a contractor who in the course of constructing a subway had taken up the sidewalk, had made and refilled an excavation under it and had relaid the sidewalk, the plaintiff contending that the caving in of the sidewalk was due to the negligent way in which the contractor did his work, evidence that in the summer preceding the accident the bank of earth at the excavation "slid" is admissible as tending to show the character of the soil at that point. *Ibid.*

Of Owner of Ship toward One employed by Stevedore under Contract with Owner.

52. Apart from contract, the duty at common law of the owner of a ship at a wharf toward an employee of a stevedore lawfully at work upon the ship is the same as that of an employer respecting the apparatus and the permanent constructions of the ship, with and upon which the employee is expected to work, even though he may be in the immediate employ of the stevedore as an independent contractor. *Crimmins* v. *Booth*, 17.

53. The relation of the owner of a ship toward a stevedore and his employees engaged in loading or unloading it implies by inherent necessity an invitation on the part of the owner to such employees to use the hatches of the ship for such purposes, and from such relation arises a duty on the part of the owner to call to the attention of the stevedore and his employees dangers in such use that are not obvious nor incident to the business, or to pay for the consequences of a failure so to do. *Ibid.*

54. Where a stevedore makes a contract with the owner of a ship to load and unload it, the owner is liable to an employee of the stevedore who, while he was standing upon a hatch in the course of his duties, was injured by the hatch falling in because it was provided with insufficient flanges and coamings to hold it in place, if the employee did not know of such insufficiency and it was not obvious and could be ascertained only by an experiment, to perform which two men at least would be required, or by accurately measuring a five foot space. *Ibid.*

55. A stevedore made with the owner of a ship a contract in writing for the loading and unloading of the ship by which it was provided that the stevedore should hire and pay the men necessary for the purpose and should "provide all necessary engines, fuel, lights, tackle and other appliances for the purpose" and should "have the sole and entire charge, control and direction of the work," that in performing the work in question "the stevedore has permission to use the ship's winches, booms, falls and tackle or any other appliances of the ship if he desires so to do, in such condition as he may find them in, on or over the ship's deck, the stevedore furnishing men to run them; but no obligation of any sort is assumed by the [owner] . . . or is to be implied from such permission . . . or otherwise to keep or have such winches, booms, falls and tackle or other appliances . . . in safe or fit condition for use . . . and this permission shall be construed as a mere license to the stevedore and his men to use

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at his or their own risk . . . any winch, boom, fall, tackle or other appliance that may happen to be on or over the ship's deck." An employee of the stevedore who had no knowledge of such contract was injured by the falling in of a hatch due to the insufficiency of the coamings and flanges upon which it rested. *Held*, that the contract did not by its terms or fair intendment include the hatches of the vessel in the "appliances" therein mentioned. *Whether*, if the contract had included the hatches among such appliances, it would have affected the rights of the employee who did not know of it, therefore was not determined. *Crimmins* v. *Booth*, 17.

Causing Death.

Action to recover for death of manager of telephone exchange killed, while working on wires on pole of system, by shock from nearby badly insulated wire of electric light company, see *ante*, 45.

Action under employer's liability act against street railway company for death of motorman was held not to be maintainable because facts did not show that, when killed, motorman was employee of defendant within meaning of act, see AGENCY, 1.

Wanton or reckless Disregard of Consequences.

Street railway company held to owe no duty to one who was trespassing on highway by using automobile in violation of registration laws, except duty not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1.

Res ipsa loquitur.

56. The doctrine of *res ipsa loquitur* is to be applied only against a party who by himself or his servants had at the time of the accident in question the control and management of the appliance or instrumentality whose failure or defective condition was the cause of the accident. *McNamara* v. *Boston & Maine Railroad*, 491.

57. The mere fact that, at the trial of an action of tort for personal injuries alleged to have been caused by reason of negligence of the defendant, both the plaintiff and the defendant offer evidence in attempted explanation of the accident, does not preclude the jury, in case they find that no satisfactory explanation has been given, from finding negligence of the defendant from the mere happening of the accident if it was one which was caused by instrumentalities in the control of the defendant at the time and which in the ordinary experience of mankind would not have happened if such instrumentalities had been in good condition and in a proper state of repair. *Ibid.*

Application of doctrine of *res ipsa loquitur* in actions against two railroad companies for injuries to plaintiff due to board being blown upon him from roof of freight car, which was loaned by one defendant to the other, by whom it was used for purpose outside of terms of bailment, see *ante*, 37–39.

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Facts that in midwinter sidewalk, which had been taken up and excavation made under it and then excavation refilled and sidewalk restored by contractor, caved in when pedestrian was walking upon it, and that there had been "slump" of soil at about the same place in summer preceding in course of similar excavation, was held to constitute evidence of negligence of contractor in refilling under sidewalk, see *ante*, 50.

Prima Facie Case.

What constitutes *prima facie* case in action by traveller on highway, who fell through coal hole, against company which was alleged to have uncovered hole and not properly recovered it, see *ante*, 47, 48.

NEW TRIAL.

See PRACTICE, CIVIL, 7, 8.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Deed in which New York, New Haven, and Hartford Railroad Company, Old Colony Railroad Company and Boston and Providence Railroad Corporation joined was held under circumstances to be valid, see BOSTON AND PROVIDENCE RAILROAD CORPORATION, 1.

NOTICE.

Under employer's liability statute, see NEGLIGENCE, 8.

Notice to attorney at law which was held not to be notice to client under circumstances, see ATTORNEY AT LAW, 1.

Notice of application for commitment of feeble minded person in accordance with R. L. c. 87, §§ 118, 119, addressed "Overseer of the Poor" and received by one of board of overseers, which was held sufficient under circumstances, see FEEBLE MINDED PERSON, 1, 2.

Notice of change in membership of firm not necessary to bind purchaser of goods, who was dealing with firm without knowing of change in its membership, see PARTNERSHIP, 5.

NUISANCE.

Arrangement by owner of private land adjoining public way, along border of walk of serrated bricks and low, unbarbed wire, strung upon posts, was held not to constitute nuisance, see NEGLIGENCE, 49.

Nuisance caused by obstruction of public way by fence cannot be enjoined by suit in equity by private landowner whose damage does not differ in kind from that suffered by general public, see EQUITY JURISDICTION, 1.

Action for maintenance of nuisance by defendant on plaintiff's land in keeping there wall of building of defendant was held not maintainable be-

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cause previously plaintiff had recovered judgment in writ of equity against defendant for land covered by wall and therefore owned that part of wall that was on his land, see REAL ACTION, 1.

OBTAINING OF PROPERTY BY FALSE PRETENSES.

Indictment for larceny, which properly included counts which formerly would have been charged as obtaining of money by false pretenses, see PLEADING, CRIMINAL, 5; LARCENY, 1, 2.

OLD COLONY RAILROAD COMPANY.

Deed in which Old Colony Railroad Company, Boston and Providence Railroad Corporation and New York, New Haven, and Hartford Railroad Company joined was held valid under circumstances, see BOSTON AND PROVIDENCE RAILROAD CORPORATION, 1.

OVERSEERS OF THE POOR.

Notice of application for commitment of feeble minded person in accordance with R. L. c. 87, §§ 118, 119, addressed "Overseer of the Poor," and received by one of board of overseers, which was held sufficient under circumstances, see FEEBLE MINDED PERSON, 1, 2.

PARTNERSHIP.

Accounting between Partners on Liquidation after Dissolution of Partnership.

1. Where a partnership has sold all its business excepting its bills receivable, but the partnership has not been dissolved, and one of the partners voluntarily takes upon himself the duty of liquidation without there having been any express agreement between the partners that he should be paid for his services, no allowance for his time and services in the liquidation should be given to him in his final accounting with his partner. *Wiggins v. Brand*, 141.

2. Where one of two partners voluntarily has assumed the duty of liquidating its affairs, in stating his account with his partner on dissolution of the partnership, he must show that all money which he has received on behalf of the firm either is available for distribution or has been disbursed lawfully, and, if he does not explain an expenditure or show that his partner assented to its having been charged to the profit and loss account, he properly may be held to owe his partner one half of the amount of such expenditure. *Ibid.*

3. Where two partners sell all the partnership business except the bills receivable and the purchaser does not assume active control immediately, but one of the partners, who voluntarily had taken upon himself the liquidation of the partnership affairs, the partnership not having been dissolved, acts as manager for the purchaser and continues to carry on the business

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under the partnership name and to use the funds of the partnership for that purpose, and in so doing the purchaser becomes indebted to the partnership in a certain amount, the liquidating partner may be held accountable to his partner for such partner's proportional share of the amount of such debt of the purchaser. *Wiggins* v. *Brand*, 141.

4. In a suit in equity between two partners for an accounting, it appeared that the defendant voluntarily had taken upon himself the duty of liquidating the affairs of the partnership, that three and a half years was a reasonable time for the complete performance of that duty, and that after that time the defendant used the firm funds for his own purposes. *Held*, that it was proper to charge the defendant with interest on the principal sum which was found due to the plaintiff from the time when the defendant should fully have performed his duties. *Ibid.*

Retirement of Partner.

5. Where one copartnership, which has been selling merchandise for several years to another copartnership, adds new members to its firm without giving any notice to the buying copartnership, and subsequently one member of the buying copartnership retires by agreement and no notice is given to the selling copartnership, which a year after such retirement gives to the buying copartnership notice of the additions to its firm and then continues to sell goods to the buying copartnership and in so doing relies in part upon the credit of its retired partner, such retired partner is liable with his former copartners for the purchase price of such goods, and, if it was not known to the retired partner who were the members of the selling copartnership, such fact does not affect his liability. *Vietor* v. *Spalding*, 234.

Notice to attorney at law of dissolution of partnership by retirement of partner was held not to be notice to client under circumstances, see ATTORNEY AT LAW, 1.

Dissolution.

On appeal from final decree in suit between partners, if it appears that decree is proper in all respects except in that it failed to order dissolution of partnership, decree may be modified so as to include such order and, so modified, may be affirmed, see EQUITY PLEADING AND PRACTICE, 3.

PASSENGER.

Actions by passengers against street railway, railroad and steamship companies, see NEGLIGENCE, 24–27, 31; SHIP, 1–6.

PATENT.

Action by owner of patent on contract implied in fact for royalties on machines not covered by plaintiff's royalties, see CONTRACT, 10.

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PAYMENT.

1. In an action against a consignee of goods, which previously had been delivered, for freight charges, in which the plaintiff sued as the assignee of a transportation company to which the charges were alleged to be due from the defendant, and in which the defendant relied on the defense of payment, it appeared that the plaintiff was the head clerk in Boston of the transportation company, a Maryland corporation, whose corporation offices were at Baltimore, that the plaintiff, contrary to a rule of the company, delivered the goods to a teamster, who for years had received and paid for freight consigned to the defendant, without prepayment of the charges, that afterwards the teamster failed to pay the charges and the defendant refused to pay them, that thereupon the plaintiff paid the amount of the charges to his employer, the transportation company, and received from that company an instrument acknowledging the receipt from the plaintiff of the amount paid by him "covering freight and charges" on the shipments in question. The plaintiff testified that before the payment he explained the situation to the auditor of the company and that the auditor "was to get an assignment of the company from Baltimore," and that later the plaintiff received an instrument, which had been forwarded to Baltimore for execution, purporting to assign to the plaintiff the claim of the company against the defendant for the freight charges in question. The defendant contended that the claim of the transportation company had been extinguished upon its payment by the plaintiff, and could not be revived by the subsequent delivery of the assignment. *Held*, that there was evidence warranting a finding that the amount paid by the plaintiff to the transportation company was not paid in satisfaction of the freight charges but was paid for an assignment of the claim against the defendant and so was received by the transportation company, and that the plaintiff was entitled to recover against the defendant under the assignment. *Barry* v. *Curley*, 42.

Offer of payment by cashier's check of deposit required at sale in foreclosure of mortgage may be refused as not proper tender, see CONTRACT, 17.

PERSONAL PROPERTY.

Action of contract for use and occupation of plaintiff's land by defendant's building, a chattel, see LANDLORD AND TENANT, 4, 6.

Question whether certain set of bars used in bar room of hotel were fixtures was held to depend upon intention of owner in affixing them to realty, which under circumstances was question of fact for jury, see FIXTURES, 1, 2.

PLEADING, CIVIL.

Declaration.

Requirements of declaration in action for maliciously inducing another to break contract with plaintiff, see UNLAWFUL INTERFERENCE, 1–3.

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Demurrer.

1. The defense that an action is barred by the statute of limitations cannot be taken by demurrer. *Miller* v. *Aldrich*, 109.
2. Upon the argument of a demurrer to a declaration containing allegations in regard to the law of another State, where the counsel on both sides refer to decisions of the courts of that State to show what the law is there, this court cannot consider the cases thus cited to them upon that question, which is one of fact. *Ibid.*
3. Upon the argument of a demurrer to a declaration containing allegations in regard to the law of another State, whatever is well averred in the declaration as to the law of that State must be taken to be true, being admitted by the demurrer as a fact. *Ibid.*
4. The question, whether an allegation in a declaration that the defendant "concealed the cause of action" can be treated, on demurrer, as an allegation that the defendant fraudulently concealed the cause of action within the meaning of R. L. c. 202, § 11, so that the statute of limitations did not begin to run until the discovery of the cause of action, here was suggested but not considered. *Bailey* v. *Wood*, 549.

Answer.

Answer in action of tort containing defective averment of justification, see SHIP, 5.

Under answer, in action for forcible ejection of plaintiff from ship, that plaintiff "was suffering" from certain disease, evidence that ejecting officer thought him to be so suffering cannot be relied on, see SHIP, 6.

PLEADING, CRIMINAL.

Indictment.

1. In an indictment for murder in the first degree the words "deliberately premeditated" are not necessary, a charge in the form prescribed by R. L. c. 218, § 67, being sufficient. *Commonwealth* v. *Min Sing*, 121.
2. In an indictment for being accessory before the fact to a murder it is sufficient to follow the form prescribed by R. L. c. 218, § 67. If the defendant needs more definite information, § 39 of the same chapter gives him a right, on motion, to a bill of particulars. *Ibid.*
3. An indictment for larceny which varies from the statutory form set forth in the schedule appended to R. L. c. 218 only by giving further information to the defendant, and which contains a full, formal and complete charge of larceny and does not charge the defendant with the commission of any other crime, is sufficient in law, and a motion to quash it must be denied. *Commonwealth* v. *King*, 379.

Bill of Particulars.

4. The provision of R. L. c. 218, § 39, that a defendant indicted for larceny may apply for a bill of particulars "as to the crime which he is

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alleged to have committed," does not give him an absolute right to require such a statement, the granting of such a motion being within the discretion of the court. *Commonwealth* v. *King*, 379.

5. Upon an indictment for larceny in thirty-one counts, the defendant filed a motion asking for a statement of particulars as to the nature and ground of each of the several crimes charged against him "whereby it shall be made to appear, and the defendant shall be apprised, whether the Commonwealth so in each count of said indictment has specifically charged and alleged the crime of embezzlement, or obtaining money by criminal or false pretenses, or larceny." The Commonwealth filed a statement of particulars, in which, besides giving sufficiently full information about all matters of fact as to which the defendant desired information, it notified him, that in each and all of the counts it asked for a conviction on the ground that he had committed each one of the crimes of larceny, embezzlement and obtaining money through false pretenses, and also in some of the counts the fourth crime of embezzlement or fraudulent conversion as a broker described in R. L. c. 208, § 47. The defendant objected to the statement and moved to have it expunged from the record and that further specifications be furnished by the Commonwealth. The motion was denied. *Held*, that the denial of the motion was proper, as the defendant could suffer no injury from being notified in advance of the demand of the Commonwealth, whether well founded or not, for a conviction, under each count for a single larceny, on proof of larceny proper or embezzlement or obtaining money under false pretenses, or, under some of the counts, of the crime of embezzlement or fraudulent conversion as a broker. *Ibid.*

In prosecution for being accessory before fact to murder, see *ante*, 2.

POLICE.

Vote by precincts as to acceptance of provisions of St. 1900, c. 133, with regard to extension of civil service law to police and fire forces of town of Natick held not to have been acceptance of act by town "at an annual town meeting or at any town meeting duly called for the purpose," see NATICK, 1.

POWER.

Where wife bequeaths property, over which she had power of appointment on her death, to trustees for certain enumerated purposes, one of which was to pay D. $5,000, D. is entitled to interest on $5,000 from year after death of testatrix, see EXECUTOR AND ADMINISTRATOR, 7.

PRACTICE, CIVIL.

Parties.

Verdict rightly ordered in action of tort against several persons with counts alleging various separate causes of action against defendants singly or in groups, but no cause of action against all of them, see *post*, 6.

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Amendment.

Motion to amend declaration which was denied rightly at close of evidence, since it did not cure defect in cause of action, see *post*, 6.

Interrogatories.

Answers to interrogatories in action by administrator for money had and received by defendant to use of plaintiff's decedent, which admitted receipt of money and did not state that it was received as gift or in satisfaction of debt, and therefore were held to make it error to order verdict for defendant without further evidence, see CONTRACT, 11.

Consolidation of Cases.

On consolidation of two petitions, one by owner and one by lessee of land, for assessment of damages due to abolition of grade crossing, each party is privileged to challenge four jurors without assigning any cause, see *post*, 1.

Challenging Jurors.

1. Where the owner of certain real estate, which has been damaged in the course of the abolition of a grade crossing of a railroad with a town way, and one who occupies it under a lease from the owner severally bring against the railroad company petitions for an assessment of the damages which they have sustained, and, under R. L. c. 48, §§ 20, 23, the cases are tried together, each party, under R. L. c. 176, § 29, is privileged to challenge four jurors without assigning any cause. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 585.

Jury and Jurors.

On consolidation of two petitions, one by owner and one by lessee of land, for assessment of damages due to abolition of grade crossing, each party is privileged to challenge four jurors without assigning any cause, see *ante*, 1.

Conduct of Trial.

Hypothetical question to expert witness.

2. In framing a hypothetical question to be put to a witness qualified as an expert, the usual practice is to allow counsel to include in the question an assumption of the existence of such facts and conditions as a jury may have a right to find upon the evidence as it is at the time the question is put to the witness or as there may be fair reason to suppose it thereafter in the course of the trial may appear to be; and in determining whether such a question shall be allowed, the judge in many cases must rely to a great extent upon the good faith of counsel in their statement as to what the evidence may be. *Delaney* v. *Framingham Gas, Fuel & Power Co.* 359.

Requests and rulings.

3. In an action for personal injuries alleged to have been caused by the negligence of a servant of the defendant, if there is no contention and

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nothing to show that the plaintiff and the defendant's servant were fellow servants, it is proper for the judge to refuse a request of the plaintiff for a ruling, that, not being fellow servants, the plaintiff did not assume the risk of being injured by the negligence of the defendant's servant, there being no occasion for making such a ruling. *McManus* v. *Thing*, 11.

Ruling as to burden of proof in action containing counts in tort and contract, which was right as to count in tort, but might have been wrong as to count in contract, sustained because no distinction was made in ruling between counts, and none was asked, see *post*, 10.

Judge's charge.

Judge's charge in action of contract for use and occupation of land by building of defendant, where answer set up payment under agreement by which plaintiff was allowed to use building of defendant, was held under circumstances not to have harmed defendant, see LANDLORD AND TENANT, 6.

Discretion of Court.

No appeal from acts of Superior Court in exercise of discretion on law side of court, see ATTORNEY AT LAW, 2.

Variance.

4. A declaration alleged that on a day in winter the plaintiff was a traveller on a certain public street, "that the defendant was engaged in excavating beneath the surface of the street . . . and so carelessly and negligently carried on his work by his servants and agents that he permitted the sidewalk . . . to drop, so that the plaintiff . . . fell into said hole or opening caused by the said negligence of the defendant." The evidence introduced by the plaintiff showed that the work of the defendant under the sidewalk had been completed two or three weeks before the accident. *Held*, that there was no variance between the pleading and the proof. *Rockwell* v. *McGovern*, 6.

Further Proof of Admitted Facts.

Plaintiff need not rely upon admissions of defendant but may introduce further evidence in corroboration thereof, see CONTRACT, 8, 9.

Ordering Verdict.

5. The objection that the facts alleged in a declaration do not entitle the plaintiff to judgment can be raised by asking that a verdict be ordered for the defendant at the close of the evidence at the trial, as well as by demurrer. *Murphy* v. *Russell*, 480.

6. At the trial of an action of tort for personal injuries received by the plaintiff from falling down an elevator well, where there are three defendants and one count of the declaration alleges that one of the defendants owned the building where the accident occurred and was negligent in failing to guard the elevator shaft and to keep it in repair, and other counts allege that the plaintiff was in the employ of the other two defendants, who were liable to him at common law and under R. L. c. 106, § 71,

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cl. 1, 2, as such employers, but no count sets forth a joint tort of all three defendants, it is proper for the presiding judge at the close of the evidence to order a verdict for the defendants and to refuse to allow the plaintiff to amend his declaration by adding a count alleging a further common law liability of two of the defendants as the plaintiff's employers. *Murphy* v. *Russell*, 480.

Ordering of verdict for defendant after findings by jury upon certain special questions submitted to them by presiding judge was held to be error because findings were not necessarily inconsistent with possible verdict for plaintiff, see WAY, 7.

Verdict should not be ordered for plaintiff in action of contract for services as surgeon, although it appears that defendant has written letters admitting performing of services by plaintiff and, although stating therein that he thought the plaintiff's charge high, repeatedly stated that he would pay bill, see CONTRACT, 9.

Case where, on re-trial of case after rescript sustaining plaintiff's exception to ruling of presiding judge ordering verdict for defendant, substantially same evidence was introduced by plaintiff and verdict again was ordered for defendant, exception to which ruling was sustained, see NEGLIGENCE, 19.

Verdict.

7. Where there is a general verdict and there are also special findings, which are not inconsistent with one another or with the verdict, the question whether the verdict should be set aside is a matter within the discretion of the presiding judge. *McManus* v. *Thing*, 11.

8. In an action, in which there has been a verdict for the defendant and the plaintiff has made a motion asking the judge to set aside the general verdict and also to set aside the answers of the jury to certain questions submitted to them by the judge, the judge may set aside one of the special findings of the jury, which there was no evidence to warrant, and at the same time permit the general verdict to stand, where there is no inconsistency in doing so. *Ibid.*

General verdict for defendant in replevin allowed to stand because it might have been rendered on either of two grounds, and it was not necessary for jury to state which, see REPLEVIN, 3.

Findings of jury upon certain special questions submitted to them by presiding judge held not to warrant ordering a verdict for defendant, because verdict for plaintiff might have been consistent with findings, see WAY, 7.

Setting aside Verdict.

See *ante*, 7, 8.

New Trial.

It is discretionary with presiding judge, in case where there are special findings as well as general verdict by jury, whether he shall set aside verdict after he has set aside one of special findings, if there is no inconsistency in his not doing so, see *ante*, 7, 8.

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Report.

9. A judge of the Superior Court under R. L. c. 173, § 105, has power in his discretion to report a case for determination by this court, although his only reason for doing so is that the losing party by accident or mistake failed to file a bill of exceptions within twenty days after the verdict, exceptions having been taken properly at the trial which in the opinion of the judge presented material questions that should be passed upon by this court. *Strong* v. *Carver Cotton Gin Co.* 209.

Appeal.

No appeal lies from acts of Superior Court in exercise of discretion on law side of court, see ATTORNEY AT LAW, 2.

Exceptions.

10. In an action in which the declaration contained two counts, one in tort and one in contract, and the answer set up a justification of the acts of the defendant, and a different rule as to the burden of proof might apply as to the different counts, the presiding judge, against the objection and subject to an exception of the defendant, ruled that the burden of proof was upon the defendant, but made no distinction between the two counts. The defendant did not ask that such distinction be made, and therefore this court, having decided that the ruling was right as to the count in tort, without deciding whether it was right as to the count in contract, overruled the defendant's exception. *Mountford* v. *Cunard Steamship Co.* 345.

PRACTICE, CRIMINAL.

Conduct of Trial.

Judge's charge.

1. In a criminal, as in a civil case, the presiding judge or judges properly may refuse to instruct the jury upon a particular part of the evidence, it not being the duty of a judge to deal with particular facts any further than seems to him necessary for the proper presentation of the issues in the case. *Commonwealth* v. *Min Sing*, 121.

Abbreviation of cross-examination.

Exercise of discretion of judges presiding at criminal trial in abbreviation of cross-examination, see WITNESS, 2.

Exceptions.

2. At the trial of an indictment for murder before two judges of the Superior Court, the counsel for the defendants made orally an offer of evidence which was excluded by the judges. The defendants' counsel indicated an intention to save an exception to the exclusion of the evidence, and the court said that which fairly implied that an exception had been saved. It was arranged that the defendants' counsel should put their offer of proof in writing and present it to the judges. On the morning of the next day of

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the trial such an offer in writing was presented to the judges, and was not referred to again by the judges or the counsel until the case had been given to the jury, when it was discovered that the judges understood that the arrangement for the presentation of the offer in writing was in order that they might consider it in writing instead of ruling upon the oral statement. The counsel for the defendant believed that the court had ruled and had excluded the evidence and believed that their exception to the ruling was recognized and had been saved to them. The judges refused to allow the exception, and, upon a petition to prove exceptions, a commissioner to whom the petition was referred found the facts above stated and also found "that the words of the court gave the counsel reasonable cause to believe that their right was saved to them." *Held*, that the exception should be allowed. *Commonwealth* v. *Min Sing*, 121.

Exception to refusal to admit evidence offered in trial of criminal case to impeach Commonwealth witness and admissible for that purpose will not be sustained if it appears that testimony of witness sought to be impeached was only upon undisputed matters and matters that did not affect question of guilt of defendant, see HOMICIDE, 2.

PRESCRIPTION.

Right of owner of land through which watercourse runs to dam waters and use head thus acquired for running mill in proper manner and usual way is not dependent upon grant of easement or prescription, see WATERCOURSE, 1.

PROBATE COURT.

Jurisdiction.

Probate of part of will.

1. *It seems* that, if a part of a will is procured by undue influence and the rest of it is not, the Probate Court has jurisdiction to reject the part improperly procured, and to admit the residue to probate. *Old Colony Trust Co.* v. *Bailey*, 288.

Guardianship of insane person.

Hearing on appeal of petition for appointment of guardian of person alleged insane, see INSANE PERSON, 1–4.

Parties.

It is within discretion of justice presiding at trial of issues, framed on appeal from decree of Probate Court allowing will, to allow counsel for parties with certain diverse interests to participate in trial, see *post*, 5.

Petition for Retention of Funds.

Claim of receiver of foreign corporation appointed in State of incorporation was held under circumstances to be such as might have been presented to Probate Court under R. L. c. 141, § 18, as claim which might "be-

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come justly due from the estate," see EXECUTOR AND ADMINISTRATOR, 10; and receiver was held proper person to present claim under circumstances, see RECEIVER, 1.

Object of proceedings in Probate Court under R. L. c, 141, §§ 13, 14, for retention of funds by executor or administrator for payment of certain claims, is not to collect claims but to extend period of time after which by R. L. c. 141, § 9, claims otherwise would be barred, see EXECUTOR AND ADMINISTRATOR, 9.

Issues to Jury.

2. On an appeal from a decree of the Probate Court allowing a will, two issues for the jury were framed, the first, whether the will was procured to be executed by undue influence of one W., and the second, whether it was procured to be executed in whole or in part by undue influence of W., "and if in part, what part." At the trial there was evidence tending to show that certain bequests were so procured, and there was no evidence tending to show that other bequests, in which W. had no interest, were so procured. Both issues were submitted to the jury. W. alleged an exception to the submission to the jury of the second issue. *Held*, that the second issue properly was submitted to the jury. *Old Colony Trust Co.* v. *Bailey*, 283.

Conduct of Trial.

Judge's charge.

3. An exception to an inaccurate statement, contained in a single sentence in a long charge of a judge to a jury, will not be sustained if it appears that the inaccuracy was cured in what was said in the charge both before and after the sentence objected to. *Old Colony Trust Co.* v. *Bailey*, 283.

4. A judge cannot be required to select a part of the testimony given at a trial and bearing on a certain question and to suggest to the jury in his charge what effect it may have by itself alone in some possible view that the jury may take of it. *Ibid.*

Participation in trial by counsel for parties diversely interested.

5. While, at the trial of an appeal from a decree of the Probate Court allowing a will, an individual beneficiary under the will is not entitled to participate separately as of right, it nevertheless is within the discretion of the presiding justice to allow him to do so if it appears that there are contentions that ought to be made in support of the will that are adverse to other contentions that ought to be made in support of those parts of the will which affect such beneficiary. *Old Colony Trust Co.* v. *Bailey*, 283.

Exceptions.

Exception to single inaccurate statement in long charge of judge to jury not sustained where it appeared that inaccuracy was cured by rest of charge, see *ante*, 3.

Appeal.

Framing of issues for jury.

6. At the hearing before a single justice of this court of an appeal from a decree of the Probate Court appointing a guardian of the respondent as an

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insane person, a motion of the respondent that issues may be framed to be submitted to a jury is addressed to the discretion of the justice who hears the case. *Cogan* v. *Cogan*, 58.

Appointment of commissioner under Equity Rule 35.

7. Where, upon an appeal from the decree of a single justice of this court affirming a decree of the Probate Court appointing a guardian of a person alleged to be insane, it appeared that the evidence had been taken down by a stenographer, who thereafter was appointed a commissioner to take the evidence under Equity Rule 35, this court did not find it necessary to pass upon the question whether a commissioner could be appointed in that way, as they affirmed the decree appealed from, assuming for the purposes of the case that the evidence was properly before them. *Cogan* v. *Cogan*, 58.

Finality of findings of fact by single justice.

8. Where, on an appeal from a decree of the Probate Court reforming and then allowing in amended form accounts of an administrator, a single justice of this court after hearing evidence makes findings showing that there is no basis of fact for the objection of the appellant, and his findings are well warranted by the evidence, which is reported in full, this court will not reverse such findings. *Wight* v. *Shaw*, 541.

Interest on legacy delayed by appeal of legatee.

Fact that payment of legacy was delayed by appeal of legatee from decree of Probate Court does not prevent him from being entitled to interest on legacy from year after death of testator, see EXECUTOR AND ADMINISTRATOR, 6.

PUBLIC OFFICERS.

Presumption that official action of board of public officers is lawful, see EVIDENCE, 1.

Notice of application for commitment of feeble minded person in accordance with R. L. c. 87, §§ 118, 119, addressed "Overseer of the Poor" and received by one of board of overseers, which was held sufficient under circumstances, see FEEBLE MINDED PERSON, 1, 2.

Under St. 1902, c. 372, § 1, officers designated by city council of Worcester to act regarding removal and placing underground of wires in streets, are officers of Commonwealth and not agents of city; and under § 7 mayor and aldermen, when acting as board of appeal, are not agents of city, but act as *quasi* judicial board of officers, see WORCESTER, 1.

RAILROAD.

Abolition of Grade Crossing with Highway.

See DAMAGES, 6-12; WAY, 1, 2; PRACTICE, CIVIL, 1.

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Obstructing Highway.

Complaint against railroad company under R. L. c. 111, § 196, for obstructing highway with cars for more than five minutes at one time, see WAY, 3.

Jointly operated Yard.

Action by employee of railroad company for injuries due to negligence of employee of defendant and another railroad company maintaining and operating a switching yard jointly, see NEGLIGENCE, 32–35.

Freight Cars of other Companies.

Actions against two railroad companies, one the owner of freight car loaned to other by whom it was used for purpose outside terms of bailment, for injury due to board blowing from roof upon person near at hand, see NEGLIGENCE, 36–39.

Liability to Passenger.

Liability to passenger for dangerous condition of station platform, see NEGLIGENCE, 31.

REAL ACTION.

1. If an owner of land upon a city street constructs a wall which encroaches upon the adjoining land, and the owner of the strip of land thus unlawfully built upon brings a writ of entry, in which he recovers judgment for the possession of the land on which the trespass was committed, he cannot afterwards maintain an action against the trespasser for an alleged nuisance in continuing the maintenance of the wall, because the part of the wall on the plaintiff's land belongs to him and the defendant has no right to remove it. *Mansfield* v. *Tenney*, 312.
2. If an owner of land on a city street brings a writ of entry to obtain possession of a strip of land on which the owner of the adjoining lot has constructed a part of a wall, and obtains a judgment for possession and costs, on which he takes out an execution, which is returned into court when the costs have been paid by the tenant, and the demandant in his writ has set forth no claim for damages and none are awarded to him, *whether* this judgment is a bar to an action for trespass subsequently brought by the demandant in the writ of entry against the same person to recover damages for injury to his property from having the wall upon it, on the ground that full damages might have been recovered in the writ of entry under R. L. c. 179, §§ 12–16, 42, here was not considered because the facts made it immaterial. *Ibid.*

REAL PROPERTY.

Question whether certain set of bars used in bar room of hotel were fixtures was held to depend upon intention of owner in affixing them to realty, which, under circumstances, was question of fact for jury, see FIXTURES, 1, 2.

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RECEIPT.

Evidence that money, paid by employee of transportation company to make good to company amount of freight charges on goods which employee had, but should not have, delivered to consignee without charges being paid, and paid with understanding that for it company should execute and deliver to employee assignment of claim against consignee, held to warrant finding that money received, not as payment of debt of consignee, but as consideration for agreement to execute and deliver assignment, see PAYMENT, 1.

RECEIVER.

1. A receiver of a foreign corporation, lawfully appointed by a court of the State of its incorporation with power "to sue for . . . compromise and settle any and all stockholders' liability that may exist under the constitution and laws of" such State "or otherwise, and to prosecute and sue for the amount of such liability or any assessments that may be made by" the court which appointed him "on account thereof for the satisfaction of the claims of the creditors" of the corporation, since he is entitled to prosecute a claim for the enforcement of an assessment against a stockholder when it becomes due, is the proper person to present to the Probate Court, in which the estate of a Massachusetts stockholder of the corporation is being administered, a petition under R. L. c. 141, § 13, seeking to have funds of the estate reserved or security given for the payment of an assessment which may be made and become due after the expiration of the two year period of limitation provided for by R. L. c. 141, § 9. *Converse* v. *Nichols*, 270.

Application of above principle to suit in equity, where failure of receiver to present such petition resulted in claim being barred by R. L. c. 141, § 9, see EXECUTOR AND ADMINISTRATOR, 10.

RELEASE.

Construction, and effect under circumstances in action by assignee of contractor against owner, of release by contractor of owner from liability under building contract, see ASSIGNMENT, 5.

REPLEVIN.

1. Chattels taken under a writ of replevin are in the custody of the law. The bond given by the plaintiff stands as security to the defendant for a proper disposition of the property according to the order of the court. *Standard Varnish Works* v. *Cushing*, 576.
2. In an action of replevin the disposition of the property, which under the writ is in the custody of the court, is to be ordered according to the rights

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of the parties at the time of making the order, although such rights may have been changed since the date of the writ. *Standard Varnish Works* v. *Cushing*, 576.

3. In an action of replevin against two defendants, one of them the mortgagor and the other the mortgagee of the goods replevied, the defendant mortgagor was defaulted, and the plaintiff offered no evidence of his title or of his right to the possession of the goods replevied, but filed a paper admitting that the defendant mortgagee did not retain or have in his possession the goods replevied when the writ was sued out, and asked the presiding judge to instruct the jury to find for this defendant on that ground. The judge refused to give this instruction, and instructed the jury to find for the defendant mortgagee on the ground that the plaintiff had failed to show any title to the property replevied sufficient to maintain the action. The jury returned a general verdict for the defendant mortgagee, and the plaintiff excepted to the refusal to give the instruction requested and to the instruction given. *Held*, that the exceptions must be overruled; that the failure of the plaintiff to prove any title to the property or a right to the possession of it was a sufficient reason for the return of the verdict, and that the plaintiff's failure to prove a taking or a detention of the property by the defendant mortgagee also was a good reason for the return of the verdict, and that it was not necessary for the verdict to show on which ground the jury reached their conclusion, as either ground was sufficient. *Ibid.*

4. In an action of replevin against two defendants, one of them the mortgagor and the other the mortgagee of the goods replevied, the plaintiff failed to show any title to or right of possession of the goods. The defendant mortgagor, who had been adjudged a bankrupt, was defaulted and the trustee of his estate in bankruptcy, who had been made a party, also was defaulted. It appeared that at the date of the writ the defendant mortgagee had a good title as mortgagee and that, very soon afterwards, he had the right of immediate possession for a breach of condition of the mortgage, but that, before he could obtain actual possession of the goods, they had been removed from the hands of the defendant mortgagor on the plaintiff's writ of replevin. The jury returned a general verdict for the defendant mortgagee, and the defendant mortgagee asked the presiding judge for an order that the goods be returned to him. *Held*, that, although as a general rule in an action of replevin a return cannot be ordered to a person from whom the chattels were not taken, and, if the defendant mortgagor had not allowed himself to be defaulted, a return of the goods to him would have been ordered, yet the defendant mortgagee would have had the benefit of such a return as the owner of the goods with a right of immediate possession under the mortgage, and therefore that justice would be done by ordering a return of the goods to the defendant mortgagee. Moreover, although the replevin bond was not before the court, it was assumed that it recited a taking of the property from the joint defendants under the writ and that it was conditioned in part upon a return of the property to them if such was the order of the court, so that a return to the defendant mortgagee would be a compliance with the requirement of

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the bond in that particular, and the plaintiff by the recital in the bond was estopped to deny that the property was replevied from the defendant mortgagee when in possession of it. *Standard Varnish Works* v. *Cushing*, 576.

Replevin by vendor of goods not allowed because title of vendor had passed by delivery, see SALE, 1.

RESERVATION.

In equity, see EQUITY PLEADING AND PRACTICE, 4, 5.

RES IPSA LOQUITUR.

See NEGLIGENCE, 37–39, 50, 56, 57.

RIPARIAN OWNER.

1. The right of a riparian owner upon navigable tide water of direct access from his land to navigable water, which is a special and peculiar right different from the public right of passage over the water, is subject to the right of the Commonwealth for the public good to take and fill the land lying below low water mark between his land and the tide water, so as to cut off direct access from his land to the navigable water. *Home for Aged Women* v. *Commonwealth*, 422.

Application of foregoing principal to St. 1903, c. 465, as amended by St. 1906, c. 402, with regard to improvement of Charles River Basin, see CHARLES RIVER BASIN, 2–4.

RULES OF COURT.

Equity Rule 31, see EQUITY PLEADING AND PRACTICE, 2.

Appointment, as commissioner under Equity Rule 35 after evidence has closed, of stenographer who had taken evidence down unofficially, see PROBATE COURT, 7.

SALE.

Vendor's Lien.

1. Where a vendor consigns goods shipped by freight to its own name in the city where the purchaser does business, and, upon being notified by the carrier of their arrival at the destination, expressly authorizes the carrier to deliver the goods to the purchaser, and the carrier thereupon at the request of the purchaser transports the goods to the carrier's warehouse in a neighboring city and stores them there in the name of the purchaser, the vendor cannot maintain replevin against the carrier for the goods, since, although the freight charges for the original shipment of the goods remain unpaid, he no longer has any right to the possession of the goods, both because he has lost his vendor's lien by the delivery to the purchaser's order,

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Sale (*continued*).

authorized by him, and because the goods are no longer in transit in the course of the shipment made by him, but have entered upon a new shipment and upon storage authorized by the purchaser alone. *Norfolk Hardwood Co.* v. *New York Central & Hudson River Railroad*, 160.

Caveat emptor.

Action against owner of land for deceit in representing to purchaser that its area was larger than it was, held not maintainable because owner pointed out boundaries to purchaser and did not dissuade him from measuring, see DECEIT, 2.

SAVINGS BANK.

1. Where the treasurer of a savings bank has been entrusted by its board of investment with the negotiation of a loan secured by a mortgage of real estate, further acts on his part, on discovering an outstanding attachment of the real estate, in requiring a first mortgage, prior to the attachment, to be assigned to the bank as security for the mortgage to the bank, instead of allowing it to be paid off, are within his implied authority as an executive officer of the corporation entrusted with the negotiation of the loan, and subsequent proceedings, to foreclose the underlying mortgage thus assigned to the bank, instituted by vote of its board of investment, are a ratification of the acquisition of the underlying mortgage as security. *Gerrity* v. *Wareham Savings Bank*, 214.
2. If a savings bank, acting in good faith and solely in the interest of the bank, takes an assignment of an underlying mortgage to secure a loan made by it which already is secured by a second mortgage held by it on the same property, instead of causing the underlying mortgage to be paid off and discharged, this is a valid transaction against a person whose claim is subject to such underlying mortgage, although the requirements of R. L. c. 113, § 26, cl. 1, and of § 29 of the same chapter in regard to the making of a loan on mortgage by a savings bank have not been complied with in taking the assignment. *Ibid.*

Application of foregoing principles to facts, see MORTGAGE, 2.

SCIRE FACIAS.

Scire facias against executrix, who also was residuary legatee and had given bond to pay debts and legacies, where waste was alleged, see EXECUTOR AND ADMINISTRATOR, 4, 5.

SEA SHORE.

Constitutionality and effect upon riparian owners and owners of flats, of St. 1906, c. 402, for the improvement of Charles River Basin, see CHARLES RIVER BASIN, 1–4; RIPARIAN OWNER, 1; FLATS, 1.

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SHERMAN ACT.

Contract held not illegal under Sherman act, 26 U. S. Sts. at Large, c. 647, see UNLAWFUL INTERFERENCE, 3.

SHIP.

Unlawful Expulsion of Passenger.

1. Although, at the trial of an action by a passenger against the owner of a transatlantic steamship to recover for an unlawful expulsion of the plaintiff as the ship was about to sail from Liverpool, England, for Boston, where the defendant relied in his answer upon an averment that the plaintiff at the time was suffering from trachoma, a dangerous and contagious disease, evidence that, about three months before, as he was about to sail from Boston to Liverpool, the defendant's "doctors or people" examined him, and also evidence that, the morning after his expulsion by the defendant, he sailed for Boston from Liverpool by a steamship owned by a different person than the defendant, is immaterial, an exception by the defendant to its admission will not be sustained, since the defendant could not have been prejudiced by its admission. *Mountford* v. *Cunard Steamship Co.* 345.
2. In an action by a woman passenger against the owner of a transatlantic steamship to recover for a wrongful eviction from the ship, evidence that because of the eviction she was left in Liverpool, England, a long distance from her friends, is competent on the question of damages. *Ibid.*
3. Where, in an action by a woman passenger against the owner of a transatlantic steamship to recover for an alleged wrongful expulsion from the ship, the defendant seeks to justify his acts upon the ground that the plaintiff was suffering from trachoma, a dangerous and contagious disease, testimony of the plaintiff's husband and others that, although they associated with the plaintiff intimately during periods near to the date of the expulsion, they did not contract the disease, is admissible in the discretion of the judge presiding at the trial. *Ibid.*
4. Where, in an action of tort for assault and battery to recover for forcible expulsion of the plaintiff a passenger from a transatlantic steamship of the defendant, the answer sets up in justification of the expulsion that the plaintiff was suffering from trachoma, a dangerous, contagious disease, the burden is upon the defendant to make out the justification alleged, and not upon the plaintiff to disprove it by showing affirmatively that his expulsion was wrongful and without justification. *Whether*, where the action is for breach of contract in committing the same act and the same justification is set up in the answer, the same rule as to burden of proof applies, was not decided. *Ibid.*
5. In an action by a passenger against the owner of a steamship the declaration contained two counts, one for assault and battery in forcibly ejecting the plaintiff from the ship, and the other for breach of contract in so doing, and the answer, besides a general denial, stated, "If the plaintiff

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Ship (*continued*).

shall introduce evidence tending to show that at the time of the acts complained of she was a passenger . . . the defendant will show that she was suffering from trachoma, a dangerous, contagious disease, and that the defendant rightfully ejected her." A trial occurred without objection to the form of the answer. *Held*, that, if such objection had been taken, the defendant could not have put in any evidence of the justification thus defectively sought to be averred. *Mountford* v. *Cunard Steamship Co.* 345.

6. The answer in an action by a passenger against the owner of a transatlantic steamship for forcibly ejecting the plaintiff from the ship set up a general denial and also averred that the defendant rightfully ejected the plaintiff because "he was suffering from trachoma, a dangerous, contagious disease." *Held*, that under such answer the defendant had no right to rely in justification of the expulsion of the plaintiff upon evidence tending to show that such expulsion occurred because the ship's physician, a duly qualified medical man, having examined the plaintiff, reported to the defendant that he ought not to be allowed upon the ship because he had trachoma, a dangerous, contagious disease. *Ibid.*

Owner's Liability to Employee of Stevedore.

Action by employee of stevedore against owner of ship for injuries caused by defective condition of hatch of ship which was not obvious or incident to his employment, and of which plaintiff was not warned, see NEGLIGENCE, 21, 22; 52–55.

STARE DECISIS.

1. Discussion by RUGG, J., of the principle of *stare decisis*. *Mabardy* v. *McHugh*, 148.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 731.

STREET RAILWAY.

Statutory Liability of Street Railway Corporation for Debts of Absorbed Corporation.

1. The West End Street Railway Company, after the enactment of St. 1887, c. 413, acquired by purchase from one who had purchased them from the Malden and Melrose Railroad Company all of the capital stock, property and assets of that company, and its treasurer then reported to the railroad commissioners that the West End Street Railway Company "owned the stock and property of the Malden and Melrose Company — all of it — and would like to have the Malden and Melrose Railroad Company report omitted." The commissioners thereupon struck the Malden and Melrose Railroad Company from their lists and reported "The Malden and Melrose having been merged in the West End by the purchase of all of its capital stock

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and assets." Thereafter for more than twenty years the West End Street Railway Company operated the system formerly of the Malden and Melrose Railroad Company as its own. In a suit in equity to compel the West End Street Railway Company to pay judgments rendered against the Malden and Melrose Railroad Company before 1887, of which the West End Street Railway Company was ignorant at the time of the purchase, it was *held*, that fair inferences from the above facts were that the terms and conditions of the purchase by the West End Street Railway Company were duly approved by the directors and by a majority of the stockholders of each of the corporations and by the railroad commissioners, as required by St. 1887, c. 413, § 1; or at any rate that the West End Street Railway Company was estopped to deny that such were the facts, and therefore that, since under those circumstances by force of § 1 the West End Street Railway Company became subject to the liabilities of the Malden and Melrose Railroad Company, the suit might be maintained. *Whiting* v. *Malden & Melrose Railroad*, 298.

2. The owner of a judgment recovered before the enactment of St. 1887, c. 413, with regard to the purchasing by the West End Street Railway Company of the stock, property and assets of other street railway companies and consolidating with them, against a street railway company, whose entire capital stock, property and assets the West End Street Railway Company purchased in accordance with the statute, has a claim under § 1 of the statute against that company irrespective of whether the company knew at the time of its purchase of the existence of the judgment or not, and can maintain a suit in equity against both companies to enforce payment of the judgment by the West End Street Railway Company. *Ibid.*

Other principles upon which above suit was determined, see CORPORATION, 1; EVIDENCE, 1, 2.

Rules for Passengers.

3. A rule of a street railway company, "All persons are warned not to enter or leave this car while it is in motion, or by the front platform," is not a notice that persons entering or leaving the car while it is in motion or by the front platform do so at their own risk. *Cutts* v. *Boston Elevated Railway*, 450.

4. A rule of a street railway company, "All persons entering or leaving this car while it is in motion or by the front platform do so at their own risk," set forth in the last two lines of five-line signs on four panels below the front and rear windows of a closed elevated car, so that the two lines in question were about twenty-eight inches above the floor of the platform, is not properly posted. *Ibid.*

5. Evidence that for two or three years, ever since an incline leading to a curve and loop of the track and to a platform for the discharge of passengers at an elevated station of a street railway company had been in use by the company, half of the passengers in almost every car that ascended the incline had gone out upon the front platform of the car and half upon the rear platform while the car was in motion, tends to show that a rule

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of the company "All persons are warned not to enter or leave the car while it is in motion, or by the front platform," had been waived by the company at least as to such station. *Cutts* v. *Boston Elevated Railway*, 450.

Scope of Employment of Motorman.

Circumstances held not to show that motorman, when killed, was employee of street railway company within meaning of employers' liability act, see AGENCY, 1.

Liability for Negligence.

Liability to passengers, see NEGLIGENCE, 24–27.

Liability to travellers on street, on foot, on bicycle or in automobile, see NEGLIGENCE, 1, 2, 28–30.

STRIKE.

Construction and performance or breach of contract for sale of coal containing condition that seller should not be responsible for delivery "if prevented by strikes or combinations of miners," see CONTRACT, 4, 15.

Liability of purchaser for coal ordered after notice from seller that strikes prevented delivery and excused performance under former contract, see CONTRACT, 16.

SUPERIOR COURT.

Jurisdiction and power of Superior Court with regard to one of its attorneys who collected and fraudulently misappropriated funds of client, see ATTORNEY AT LAW, 2, 3.

Superior Court has no power to vacate decree for divorce after it has become absolute, where court had jurisdiction to grant decree, see MARRIAGE AND DIVORCE, 1.

SURETY.

Suit in equity to enforce liability of surety on bond given under R. L. c. 6, § 77, as security for payment by contractor for labor performed or furnished and for materials used in construction of public work under contract with Commonwealth, see EQUITY JURISDICTION, 3–8; BOND, 1.

TAX.

Recovery of Tax paid under Protest.

1. The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, is not a mere statute of limitation but is a condition precedent to a right of action. *Wheatland* v. *Boston*, 258.
2. The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, applies to an action for the amount of a tax laid under an unconstitutional statute. *Ibid.*

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3. The requirement of R. L. c. 13, § 86, that an action for the amount of a tax paid under protest must be brought within three months after the payment of the tax, applies to an action for the amount of a special assessment so paid, such an assessment being a "tax" within the meaning of the statute. *Wheatland* v. *Boston*, 258.

TELEPHONE COMPANY.

Order of board of aldermen of Boston, purporting to give to new telephone company rights in all present and future streets for maintenance of telephone system not yet inaugurated, held to be attempt to grant franchise, and therefore void, see MUNICIPAL CORPORATIONS, 1, 2.

TIDE WATER.

Effect of St. 1903, c. 465, as amended by St. 1906, c. 402, for improvement of Charles River Basin, upon rights of riparian owners and of owners of flats, and constitutionality thereof, see CHARLES RIVER BASIN, 1–4; RIPARIAN OWNER, 1; FLATS, 1.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRESPASS.

Upon Real Estate.

1. In an action for trespass upon a strip of land belonging to the plaintiff by constructing upon it a part of the foundation supporting a wall of the building upon the adjoining lot on a city street, it appeared that about three years before the date of the writ the plaintiff brought an action for the same trespass, in which the presiding judge instructed the jury to take as the measure of damages the diminished value of the plaintiff's property, whereupon the jury returned a verdict for the plaintiff in a substantial sum, for which judgment was entered, and the amount was paid in full by the defendant and was received by the plaintiff. It further appeared that since the judgment in the previous action there had been no trespass other than the maintenance of the same wall upon the plaintiff's land. Although the case was disposed of on another ground, it was intimated that the previous judgment and its satisfaction must be a bar to this action, as the plaintiff had received full compensation for all the injury done to his property by the act of the defendant in going upon his land and erecting there this permanent structure. *Mansfield* v. *Tenney*, 312.

Effect, in action for damages caused to plaintiff by defendant's maintaining wall of building upon his land, of previous judgment for plaintiff in writ of entry by him for possession of land having wall upon it, see REAL ACTION, 1, 2.

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Upon Highway.

One using automobile upon highway in violation of registration laws was held to be trespasser, to whom street railway company owes no duty except duty not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1, 2.

TRUST.

Creation.

1. A father made a deposit with the Massachusetts Hospital Life Insurance Company of $25,000 in trust for the benefit of his son H. By a contract in writing between the donor and that company it was provided that during the life of H. the company should pay the income to the donor, for his use during his life, and at his death should pay it to the donor's brother for the benefit of H. "payable to him at his discretion, in such sums as he may think judicious." At the death of H. the trust fund was to be paid to the donor or his executors or administrators. The contract further provided as follows: "If the grantees of this annuity shall at any time become bankrupt or insolvent, or if their interest under this annuity shall be attached or seized on any process of law or in equity, their right to receive payment of the annuity in money shall forthwith cease, and thereafter, the company instead of paying said annuity in money to said grantees, shall retain the amount in their hands, and thereafter" shall apply it as directed. The testator died before his son H. The fifth paragraph of his will was as follows: "I give and bequeath to each of my children living at my decease the sum of $1,000, which is to be held in trust by my executors and to be paid or to be expended by them for the support of the children respectively during the year after my decease; and it is to be paid or expended in such sums and in such manner as may seem to my executors judicious." The sixth paragraph of his will was as follows: "Having invested in the Massachusetts Hospital Life Insurance Company . . . a sum for the benefit of each of my children, the income of which is for their support respectively; in case the income does not amount annually to $1,200 for each respectively, I direct my executors to supply any deficiency from that sum from the income of my other estate — so that each may have $1,200 for their support. And the $1,000 to be used for my son H. under the fifth item of this will, with the above provision, is to be in full of his portion of my estate, I being convinced that $1,200 per annum for his support will be sufficient for all his necessary wants and that more would be injurious." *Held*, that the contract and the sixth paragraph of the will must be construed together, that they created a trust to be administered wholly by the trustee under the contract, and that the expenses of administering the trust were to be deducted from the income in estimating the deficiency which must be supplied by the executors of the will to the trustee under the contract to give to H. an income of $1,200 a year. *Held, also*, that under the terms of the trust H. had no power to alienate the income which was payable to him at the discretion of the trustee, having no right to dispose of it until actually in his possession. *Berry* v. *Dunham*, 138.

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Assignment of life insurance policy purporting to be to trustees to be named in will of assignor was held to be ineffectual because it did not create present trust and was not executed with formality required for execution of will, see ASSIGNMENT, 1–3.

Spendthrift Trust.

Construction of spendthrift trust created by contract between insurance company and donor and by will of donor, see *ante*, 1.

Resulting Trust.

No recovery on theory of resulting trust or otherwise on benefit certificate of one who named his wife beneficiary but who, after death of wife, failed to name new beneficiary and died leaving no heir or next of kin and no one dependent upon him, see INSURANCE, 8.

Construction.

Construction of spendthrift trust created by contract between donor and insurance company and by will of donor, see *ante*, 1.

Construction of will showing intent of testator, in creating trust, as to distribution of proceeds and as to power of trustees with regard to selling real estate, see *post*, 2, 3.

Powers of Trustee.

2. Where a will makes it the duty of the trustee thereunder to provide for the needs of certain beneficiaries, and the estate consists of both real and personal property, the trustee by necessary implication has power to sell real estate included in the trust to carry out its purposes. *Smith* v. *Haynes*, 531.

3. After clauses disposing of the residue of his estate among a neice and grandnephews and grandnieces, a testator provided as follows: "If at my Decease any of said Heirs are not 21 — years of age I will that the Money going to them be invested by the trustees in good City Bonds or in some good Savings Banks and if said Heirs are not in need of the money it shall remain invested until they becom of age." The will nowhere specifically gave the trustees power to sell real estate. The residue was both real and personal estate. *Held*, that it was the intent of the testator that each beneficiary's share should be paid to him as he reached majority, that whether or not a beneficiary was "in need of money" at any time was to be determined by the trustees in the exercise of sound judgment and wise discretion in the light of all attendant conditions, and that by implication without express statement there was conferred upon the trustees a power of sale of real estate. *Ibid.*

Powers of trustees of voluntary unincorporated association formed on reorganization of former association, see VOLUNTARY ASSOCIATION, 1.

Administration cy pres.

Construction of residuary clause of will according to which trust was ordered to be administered *cy pres*, see CHARITY, 1.

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UNDUE INFLUENCE.

If part of will was procured by undue influence, that part may be rejected and rest allowed, see PROBATE COURT, 1.

Action by administrator against one alleged to have procured money from decedent through fraud or undue influence, see FRAUD, 4.

Proper submission to jury, on appeal from decree of Probate Court allowing will, of two issues, whether whole will was procured by undue influence, and whether part was so procured, and, if so, which part, see PROBATE COURT, 1, 2.

UNFAIR COMPETITION.

Declaration in action for maliciously inducing another to break contract with plaintiff was held good on demurrer which set up that contract, which defendant was alleged to have caused to be broken, was illegal and in restraint of trade, see UNLAWFUL INTERFERENCE, 1–3.

UNLAWFUL INTERFERENCE.

1. In a declaration in an action for maliciously inducing another person to break his contract with the plaintiff, it is not necessary to set out the statements, if any, which were made by the defendant to induce the third person to break the contract. *Wheeler-Stenzel Co.* v. *American Window Glass Co.* 471.

2. In the declaration in an action for maliciously inducing another person to break his contract with the plaintiff, it is not necessary to set out the contract between the plaintiff and the third person. It is sufficient to state its effect so far as it is material. *Ibid.*

3. A declaration alleged that the plaintiff was a corporation, organized under the laws of this Commonwealth for the purpose among others of jobbing or retailing window glass, with its principal place of business in Boston, that it had been engaged for many years in jobbing and retailing window glass to customers, principally in Boston and New England, and that it and other window glass jobbers throughout the United States entered into contracts with an association called the National Window Glass Jobbers Association, by which the association agreed to purchase window glass in large quantities from the manufacturers thereof, principally the defendant, and to sell it to the plaintiff and the other jobbers, that the plaintiff under its contract was entitled to receive from the association a large quantity of window glass, namely, two hundred thousand boxes, but that the defendant, with knowledge of the contract between the plaintiff and the association, and with intent to injure the plaintiff in its business, maliciously induced the association to break its contract with the plaintiff and to refuse to deliver to it any of the window glass to which the plaintiff was entitled. The defendant demurred to the declaration, contending that the contract between the plaintiff and the association, as described in the declaration, was in unlawful restraint of

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trade, and was illegal both at common law and under 26 U. S. Sts. at Large, c. 647, commonly known as the Sherman act, and therefore that the interference of the defendant to prevent the performance of the contract was justified as fair trade competition. *Held*, that there was nothing in the contract described in the declaration in violation of the Sherman act, so called, nor anything tending to create a monopoly or to operate in restraint of trade at common law, and that the demurrer should be overruled, the plaintiff having stated a case on which it was entitled to recover damages from the defendant for knowingly and maliciously inducing the association to break its contract with the plaintiff. *Wheeler-Stenzel Co.* v. *American Window Glass Co.* 471.

USAGE.

Question and offer of proof thereon, which were held incompetent to show custom in railroad yard as to watching out for switching engine, see NEGLIGENCE, 34.

Action for injury to plaintiff from negligent operation of freight elevator by defendant's servant, where defendant's servant, who was using elevator according to lawful and proper custom that any servant of any tenant of building might use elevator exclusively until his use was completed, but before he had finished using elevator, permitted plaintiff to come aboard, and plaintiff therefore was merely licensee upon elevator, see NEGLIGENCE, 42, 43.

VARIANCE.

See PRACTICE, CIVIL, 4.

VERDICT.

See PRACTICE, CIVIL, 5–8; CONTRACT, 9; NEGLIGENCE, 19; WAY, 7.

VOLUNTARY ASSOCIATION.

By-laws.

1. In a suit in equity for an accounting, it appeared that the defendants were trustees of a voluntary unincorporated association of which the plaintiffs were members, and as such trustees were in possession of certain land and funds, that the purpose of the association as stated in its by-laws was "managing and improving certain lands and buildings located in Scituate;" that the association grew out of a reorganization of a former association, and among the property conveyed to the new organization at the time of the reorganization was certain hotel property upon which the defendants subsequently expended money which the plaintiffs contended was expended wrongly because the former association had obtained possession of the property through receiving a mortgage of it to secure a loan of money advanced to the mortgagor, and subsequently receiving from the mortgagor a release of the equity of redemption, acts

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which, the plaintiffs contended, were outside of the former association's by-laws. It appeared that the mortgagor had purchased the property from the former association. *Held*, that it was immaterial whether or not the former association acted within its powers in acquiring the property in question, since it was properly property of the new organization, and therefore was property which the defendants under the by-laws were to manage and improve, and upon which therefore they could expend money of the association. *Quimby* v. *Tapley*, 601.

WAIVER.

Whether, on facts, there was waiver of condition precedent to performance of contract, was held to be question of fact for jury, see CONTRACT, 2.

Evidence tending to show waiver by street railway company of certain rules, see STREET RAILWAY, 5.

WATERCOURSE.

1. The right of the owner of land through which a watercourse flows, to dam its waters and use the head of water thus acquired for the running of a saw mill at all seasons of the year in a proper manner and in the usual way in which such mills are operated, is a right inseparably connected with the ownership of the land and does not depend upon the acquisition by deed or prescription of rights above or below the dam, nor does such use create any easement in lands below the dam; and therefore such right of an upper riparian owner is not an incumbrance upon land conveyed by a lower riparian owner and does not constitute a breach of a covenant against incumbrances contained in the deed under which such land is conveyed. *Corse* v. *Dexter*, 81.

WAY.

Private.

Extinguishment.

1. Where, by the provisions of a lease in writing, the lessor grants to the lessee "a right of way of at least twelve feet in width from the northerly line of said lot [described in the lease] to the cart path . . . and to a point on said cart path within two hundred feet at least from" land of an adjoining owner, "together with a right of way over said cart path or equally convenient way . . . to M. Street," and the lessee, with the acquiescence of the lessor, adopts and uses a way within the location mentioned, a definite assignment of the way is effected; and if, in accordance with a decree made in grade crossing proceedings under R. L. c. 111, §§ 149–152, as amended by Sts. 1902, c. 440, § 3; 1905, c. 408, § 2, a new street is constructed upon an embankment which lies between the cart path and the land leased and is elevated from twenty-four to thirty-eight feet beside such land, the private way thus established is discontinued and extinguished. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 585.

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Petition against railroad company for assessment of damages resulting to lessee in case of such extinguishment, see DAMAGES, 6–12.

Lessee's rights upon extinguishment of way granted by lessor.

2. Where, in a lease of a parcel of real estate, which is in one corner of a large tract owned by the lessor, the lessor grants to the lessee a right of way from the land described to a certain cart path "together with a right of way over said cart path or other equally convenient way" to certain points at the termini of the cart path, and, under authority of a decree abolishing a grade crossing of a railroad with such cart path, a new street is constructed upon an embankment which lies between the cart path and the land leased and rises from twenty-four to thirty-eight feet above them, the lessor cannot be compelled to assign to the lessee another convenient way connecting the leased premises with the points beyond the termini of the cart path, nor is a way of necessity created for the lessee by such acts of eminent domain occurring after the execution of the lease. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 585.

Petition against railroad company for assessment of damages resulting to lessee in case of such extinguishment, see DAMAGES, 6–12.

Of necessity.

Where, in abolition of grade crossing, private way which had been assigned by lessor of land to lessee is abolished, lessee does not acquire way of necessity in place thereof, see *ante*, 2.

Public.

Extent of public easement.

Easement of public in street does not give right to construct trestle over it for accommodation of street cars, see DAMAGES, 5.

Control of, by municipality.

Order of board of aldermen of Boston, purporting to give to new telephone company rights in all present and future streets for maintenance of telephone system not yet inaugurated, held to be attempt to grant franchise, and therefore void, see MUNICIPAL CORPORATIONS, 1, 2.

Obstruction by railroad company.

3. It is no defense to a complaint against a railroad corporation under R. L. c. 111, § 196, for obstructing a highway with cars for more than five minutes at one time, that the continuance of the obstruction was due solely to the unlawful acts of third persons not in the defendant's employ. *Commonwealth* v. *New York Central & Hudson River Railroad*, 394.

Obstruction by fence.

One whose land is injured by obstruction of public way by fence but who shows no damage differing in kind from that suffered by general public cannot by suit in equity in own name enjoin maintenance of fence, see EQUITY JURISDICTION, 1.

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Way (*continued*).

Obstruction negligently left in street by traveller.

Action against contractor for injuries received by traveller on street from driving upon pile of dirt negligently dumped there by another traveller, involving questions whether traveller dumping dirt was acting as servant for defendant and within scope of employment, see AGENCY, 2, 3.

Defect in highway.

4. The fact that changes in a public street of a city are being made under authority of a statute providing for the abolition of a grade crossing does not relieve the city from its statutory liability for an injury to a traveller caused by a defect in the street, if no order has been made by the proper authorities of the city formally closing the street to public travel. *Hurley v. Boston*, 68.
5. A traveller on a city street in many cases may be justified in thinking that a notice that the way is closed to public travel, placed upon a barrier in the street, is no broader in its scope than the barrier to which it is attached and that the thing closed to public travel is only that part of the street which is shut off by the barrier. *Ibid.*
6. At the trial of an action of tort under Pub. Sts. c. 52, §§ 17, 18, against a city to recover for bodily injury to and the death of the plaintiff's intestate, a woman about sixty years of age, caused by her walking on a dark night off an abutment thirty feet high in a public street made by the defendant in the course of raising the grade of the street, there was evidence tending to show that the abutment was about four hundred and fifty feet distant from a public square, that there was no obstruction in the street between the square and the abutment, that there were barriers in the street at the square, but with ample room at both ends for persons on foot to pass them and a muddy path worn there where persons had done so; that the plaintiff's intestate lived on a street near the street in question and had not been on the latter street since work had been begun thereon by the city, that on the night of the accident she entered the street by passing the barriers at the square and walked straight ahead, thinking that her path was clear until, without warning, she fell. *Held*, that the question, whether the plaintiff's intestate was in the exercise of due care, was for the jury. *Ibid.*
7. At the trial of an action of tort against a city under Pub. Sts. c. 52, §§ 17, 18, to recover for bodily injury to and the death of the plaintiff's intestate caused by his walking at night off an abutment which the plaintiff alleged that the defendant had made in a public street in raising its grade and had not properly guarded, it appeared that the changes in the surface were being made under the provisions of a statute abolishing a grade crossing of a railroad with a public street, that the street where the abutment was had not been formally closed to travel by any vote of the authorities having the right to close it, that no lights or barriers had been placed on or near the abutment, that the street was one of several which proceeded from a public square about four hundred and fifty feet from the abutment, and that about two hundred and twenty-five feet from the abutment it was crossed at right angles by another street. Certain wit-

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nesses for the defendant stated that at the public square there were barriers, with lights and notices prohibiting travel on the street, placed across the street in question, but with spaces at the ends of the barriers large enough for persons to pass freely around the barriers, (one witness stating that there was a space of seven or eight feet at one end,) and that there were like barriers and lights across the intersecting street and on each side of but not in the street in question. There was other evidence tending to show that the public square was one much used, that many people lived and had business on the street in question and went back and forth around the ends of the barriers at the square, a beaten muddy path having been worn there by them, there being no sidewalk. The presiding judge, having left to the jury the special question whether the city maintained the barriers and lights described by the defendant's witnesses and the jury having answered affirmatively, ruled that there was no evidence of negligence on the part of the defendant. *Held*, that the ruling was wrong, since the special finding related only to the existence of the barriers and lights and the question, whether they were suitable and sufficient, still remained to be passed upon by the jury. *Hurley* v. *Boston*, 68.

Action against street railway company by one injured by riding on bicycle into open trench which company had undertaken to guard, see NEGLIGENCE, 29, 30.

Action by passenger alighting from street railway car for injuries alleged to have been caused by defect in street at place of alighting, see NEGLIGENCE, 27.

Nuisance near way.

Arrangement, by owner of private land adjoining public way, of serrated bricks, and low, unbarbed wire, strung upon posts, along border of sidewalk held not to be negligent, see NEGLIGENCE, 49.

Automobile.

One using automobile upon highway in violation of registration laws was held to be trespasser, to whom street railway company owes no duty except duty not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1.

Trespasser.

One using automobile upon highway in violation of registration laws was held to be trespasser, to whom street railway company owes no duty except duty not to injure him by acts done with wanton or reckless disregard of consequences, see AUTOMOBILE, 1.

WEST END STREET RAILWAY COMPANY.

Suit against West End Street Railway Company under St. 1887, c. 413, § 1, to recover amount of judgment against Malden and Melrose Railroad Company which was rendered before its assumption by West End Street Railway Company, and questions arising therein, see STREET RAILWAY, 1; CORPORATION, 1; EVIDENCE, 1, 2.

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WILL.

Validity of part of will not procured by undue influence upheld and part so procured rejected, see PROBATE COURT, 1–5.

Assignment of life insurance policy which was held ineffectual because it did not create present trust and was not executed with formality required for execution of will, see ASSIGNMENT, 1–3.

WIRES.

Suit in equity against city of Worcester to enjoin action by officers appointed by city council under St. 1902, c. 372, with regard to removing wires from streets and placing them underground, see WORCESTER, 1, 2; EQUITY PLEADING AND PRACTICE, 4.

WITNESS.

Adverse Party.

1. One who calls the adverse party as a witness under R. L. c. 175, § 22, is not bound by his testimony, and has a right to ask the jury to believe certain facts testified to by him and to disbelieve his explanations of them. *Anderson* v. *Middlebrook*, 506.

Respondent, in petition for appointment of guardian of respondent as insane person, may be called upon to testify by petitioner, although he protests against doing so, see INSANE PERSON, 2.

Cross-examination.

2. In a criminal trial, as in a civil one, it is within the discretion of the presiding judge or judges to refuse to permit a witness to be asked on his cross-examination a question which he already has answered twice to the same effect, especially where the question relates to an immaterial matter. *Commonwealth* v. *Min Sing*, 121.

Expert.

Whether hypothetical question to expert witness, based on facts not yet in evidence, but which counsel state will be in evidence, shall be allowed, is in discretion of court, see PRACTICE, CIVIL, 2.

Impeachment.

Exception to refusal to admit evidence offered in trial of criminal case to impeach Commonwealth witness, and admissible for that purpose, will not be sustained if it appears that testimony of witness sought to be impeached was only upon undisputed matters and matters that did not affect question of guilt of defendant, see HOMICIDE, 2.

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WORCESTER.

1. Under St. 1902, c. 372, providing in § 1 that the city council of the city of Worcester may by ordinance designate some officer or officers of the city who shall have exclusive authority to cause all telephone, telegraph and certain other wires to be removed from the streets and placed underground, and in § 7 making the mayor and aldermen of the city a board of appeal for persons aggrieved by any act or decision of such officer or officers, such officers, when thus designated by ordinance, are public officers of the Commonweath and are not agents of the city, and the mayor and aldermen, when acting as a board of appeal under the statute, are not agents of the city but act as a *quasi* judicial board of officers. *Postal Telegraph-Cable Co.* v. *Worcester*, 320.
2. A suit in equity cannot be maintained against the city of Worcester to enjoin it from causing certain telegraph wires to be placed underground by authority of the provisions of St. 1902, c. 372, as the city of Worcester has no power to enforce the provisions of that statute. *Ibid.*

WORDS.

"Annual town meeting." See *Sweeney* v. *Selectmen of Natick*, 539, 540.
"As soon as possible." See *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169, 174.
"Completion of the work." See *Sampson Co.* v. *Commonwealth*, 326, 337.
"Debts." See *Lothrop* v. *Parks*, 104, 106, 107.
"Embezzles or fraudulently converts." See *Commonwealth* v. *King*, 379, 383, 391.
"Heirs." See *Smith* v. *Haynes*, 531, 534.
"My will." See *Frost* v. *Frost*, 100, 102.
"Need." See *Smith* v. *Haynes*, 531, 534.
"Negotiation." See *Everson* v. *General Accident, Fire & Life Assurance Corporation*, 169, 172.
"Official ballot." See *Sweeney* v. *Selectmen of Natick*, 539, 540.
"Satisfactory." See *Traiser* v. *Commercial Travellers' Eastern Accident Association*, 292, 295.
"Share and share alike." See *Smith* v. *Haynes*, 531, 533.
"Steal." See *Commonwealth* v. *King*, 379, 385.
"Tax." See *Wheatland v. Boston*, 258, 261, 262.
"Will." See *Frost* v. *Frost*, 100, 102.

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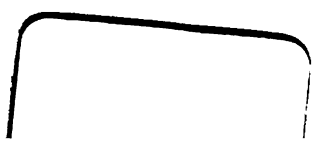

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